STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF TRANSPORTATION

In the Matter of Valley Infrastructure
d/b/a/ Zumbro River Constructors;
State Project No. 1017-12,
State Contract S05063

FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION

The above-entitled matter came on for an evidentiary hearing before Administrative Law Judge Barbara L. Neilson on July 8, 9, 10, and 15, and September 15, 2009. The evidentiary hearing was held at the Office of Administrative Hearings in St. Paul, Minnesota. The parties submitted post-hearing memoranda on October 30, 2009, and reply briefs on November 13, 2009. By letter dated November 20, 2009, Zumbro River Constructors objected to the Appendix attached to the Department's reply memorandum. The OAH record closed on December 1, 2009, upon receipt of the Department's response.

Michael A. Sindt, Assistant Attorney General, represented the Minnesota Department of Transportation, Office of Construction and Innovative Contracting ("Mn/DOT"). Patrick J. Lee-O'Halloran, Attorney at Law, Hammargren & Meyer, P.A., represented Respondents Valley Infrastructure d/b/a Zumbro River Constructors ("ZRC") and Hansen Thorp Pellinen Olson, Inc. ("HTPO").

STATEMENT OF ISSUES

The issues presented in this case are whether Mn/DOT properly determined that the surveying work performed by HTPO employees on the Trunk Highway 212 Project (State Project Number 1017-12) was subject to the Minnesota Prevailing Wage Act; and, if so, what, if any back wages are owed to HTPO's employees.

The Administrative Law Judge concludes that, in an appropriate case, the PWA likely could be interpreted to cover at least some portion of the work performed by surveyors on projects funded in whole or part by state funds. However, the Administrative Law Judge finds that the present case does not present an appropriate case for application of the PWA and that the Respondents cannot properly be required to pay back wages because (1) Mn/DOT and DOLI failed to properly assign a wage rate to HTPO's survey crews under Minn. R. 5200.1030, subp. 2a(C), and 5200.1040(F); (2) DOLI did not take action to initiate rulemaking to define the surveyor classification in the Master Job Classifications within 90 Days of the initial decisions by MN/DOT and DOLI that surveyors were subject to the PWA; (3) Mn/DOT's attempt to enforce the PWA with respect to surveyors amounts to unauthorized rulemaking; and

(4) Mn/DOT failed to carry its burden to show by a preponderance of the evidence that Common Laborer was the most similar trade or occupation. Accordingly, the Administrative Law Judge recommends that the Commissioner withdraw Mn/DOT's claim that back wages are owed to HTPO employees and remit to Respondents any contract proceeds that have been withheld.

Based upon all of the testimony and exhibits, and the arguments of the parties, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Background

A. Minnesota Prevailing Wage Statute and Rules

1. The Minnesota Prevailing Wage Act ("PWA" or the "Act")[1] is a minimum wage law that was adopted in 1973[2] and applies to certain state contracts that are financed in whole or in part by state funds. The purpose of the PWA is to ensure that "laborers, workers, and mechanics" who work on projects financed in whole or in part by state funds are paid wages that are "comparable to wages paid for similar work in the community as a whole."[3] The PWA complements the federal Davis-Bacon Act,[4] which was first enacted in 1931. The Davis-Bacon Act applies to federally-funded projects and has a somewhat different statutory scheme. The U.S. Department of Labor is responsible for enforcing the prevailing wage requirements imposed by federal law under the Davis-Bacon Act.

2. The PWA contains a specific provision relating to contracts for the construction or maintenance of a highway based on bids to which the state is a party.[5] The Act specifies that a "laborer or mechanic" employed by a contractor, subcontractor, agent, or other person doing or contracting to do all or part of the work under such a contract "must be paid at least the prevailing wage rate in the same or most similar trade or occupation in the area."[6]

3. The Minnesota Department of Labor and Industry ("DOLI") has authority to adopt administrative rules relating to the PWA.[7] The Minnesota Department of

[1] The PWA is codified at Minn. Stat. §§ 177.41-177.44.
[2] Minn. Laws 1973, ch. 724.
[3] Minn. Stat. § 177.41.
[4] 40 U.S.C. §§ 3141-3148. In addition to the Davis-Bacon Act itself, prevailing wage provisions have been added to approximately 60 laws involving federally-assisted construction projects. As a result, federal interpretations frequently refer to "Davis-Bacon and Related Acts" or "DBRA." *See, e.g.,* Exs. 104, 105.
[5] Minn. Stat. § 177.44.
[6] Minn. Stat. § 177.44, subd. 1.
[7] *See, e.g.,* Minn. Stat. §§ 175.171(2) (granting DOLI general authority "to adopt reasonable and proper rules relative to the exercise of its powers and duties, and proper rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings"); Minn. Stat. § 177.28, subd. 1 (authorizing DOLI to "adopt rules, including definitions of terms, to carry out the purposes of section 177.20 12177.44, to prevent the circumvention or evasion of those sections"); Minn. Stat. § 177.44,

Transportation ("Mn/DOT") does not have rulemaking authority in connection with the PWA.[8]

4. Under the provisions of the PWA relating to highway contracts, DOLI is responsible for defining classes of laborers and mechanics; determining the hours of labor and wage rates prevailing in all areas of the state for all classes of labor and mechanics commonly employed in highway construction work; and certifying the prevailing hours of labor, the prevailing wage rate, and the hourly basic rate of pay for all classes of laborers and mechanics at least once a year.[9]

5. The Commissioner of Mn/DOT is authorized by the PWA to "require adherence" to Minn. Stat. § 177.44, and thus has a role in enforcing the provisions of the Act. Under the statute, Mn/DOT may demand that contractors and subcontractors furnish copies of payrolls and may "examine all records relating to hours of work and the wages paid laborers and mechanics on work to which this section applies."[10]

6. The DOLI rules define the phrase "laborer or mechanic" to mean "a worker in a construction industry labor class identified in or pursuant to part 5200.1100."[11] The rules promulgated under the PWA by the DOLI define the phrase "work under the contract" to mean "all construction activities associated with the public works project."[12] The rules adopted by the U.S. Department of Labor under the Davis-Bacon Act define "laborer or mechanic" to include "at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial" and indicates that the term "does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual."[13]

7. Between 1997 and early 2009, the Master Job Classifications set forth in the DOLI rules identified nine code numbers under the overall classification of laborers: Code 101 – Laborer, common (general labor work); Code 102 - Labor, skilled (assisting skilled craft journeyman); Code 103 - Laborer, Landscaping (gardener, sod layer and nursery operator); Code 104 - Flag person; Code 105 - Watch person; Code 106 - Blaster; Code 107 - Pipe layer (water, sewer and gas); Code 108 - Tunnel miner; and Code 109 - Underground and open ditch laborer (eight feet below starting grade level).[14] Other classifications in the rules applied to equipment operators, truck drivers, and special crafts such as carpenters, ironworkers, and painters.[15]

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subds. 3 and 4 (directing DOLI to investigate and determine the classes of labor and prevailing wage rates for highway construction projects). DOLI's administrative rules relating to the PWA are set forth in Minn. R. 5200.1000 - 5200.1120.

[8] Transcript ("T.") 17-18, 69.

[9] Minn. Stat. § 177.44, subds. 3 and 4.

[10] Minn. Stat. § 177.44, subd. 7.

[11] Minn. R. 5200.1106, subp. 5(A).

[12] Minn. R. 5200.1106, subp. 2; T. 64.

[13] 29 C.F.R. § 5.2(m).

[14] *See, e.g.,* Minn. R. 5200.1100, subd. 2 (2007) (included in Ex. 103); T. 19.

[15] T. 19, 31; Ex. 103.

8. At all times relevant to this matter, the Master Job Classifications set forth in the DOLI rules relating to the PWA did not identify survey field technicians as a labor classification to be used by contractors in documenting classes of labor on prevailing wage projects.[16]

9. The DOLI rules set forth the following process to be followed in instances in which work on a prevailing wage project is performed by a class of labor not named in the Master Job classifications:

> If work is performed by a class of labor not defined by part 5200.1100, Master Job Classifications, the contracting agency shall assign a wage rate and the commissioner of labor and industry shall review and certify the assigned wage rate based on the most similar trade or occupation from the area wage determination. Within 90 days, the Commissioner of Labor and Industry must initiate the rulemaking procedure so that the classification will be defined in the Master Job Classifications in Part 5200.1100.[17]

10. The DOLI rules also specify that each class of labor that is established must be based upon "the particular nature of the work performed with consideration given to those trades, occupations, skills, or work generally considered within the construction industry as constituting distinct classes of labor." In addition, the rule specifies that DOLI must consider "work classifications contained in collective bargaining agreements, apprenticeship agreements on file with the department, the United States Department of Labor Dictionary of Occupational Titles, and customs and usage applicable to the construction industry."[18]

11. The *Dictionary of Occupational Titles* developed by the U.S. Department of Labor defines "Surveyor Assistant, Instruments (profess. & kin.)" as follows:

> Obtains data pertaining to angles, elevations, points, and contours used for construction, map making, mining, or other purposes, using alidade, level, transit, plane table, Theodolite, electronic distance measuring

[16] T. 33, 61; *see* Ex. 103. In March 2009, DOLI adopted an amendment to Minn. R. 5200.1100, subd. 2, which established a new code number 110 for survey field technicians. The amendment states that Code No. 110 applies to "Survey field technician (operate total station, GPS receiver, level, rod or range poles, steel tape measurement; mark and drive stakes; hand or power digging for and identification of markers or monuments; perform and check calculations; review and understand construction plans and land survey materials). This classification does not apply to the work performed on a prevailing wage project by a land surveyor who is licensed pursuant to Minnesota Statutes, sections 326.02 to 326.15." At the same time, subdivision 2 was also amended to add new Code No. 111 for "Traffic control person (temporary signage)" and new Code No. 112 for "Quality control tester (field and covered off-site facilities; testing of aggregate, asphalt, and concrete materials); limited to Minnesota Department of Transportation highway and heavy construction projects where the Minnesota Department of Transportation has retained quality assurance professionals to review and interpret the results of quality control testers' services provided by the contractor." These amendments to Minn. R. 5200.1100, subd. 2, became effective on March 30, 2009.

[17] Minn. R. 5200.1030, subp. 2a(C); T. 72-74.

[18] Minn. R. 5200.1040.

> equipment, and other surveying instruments. Compiles notes, sketches, and records of data obtained and work performed. Directs work of subordinate members of survey team. Performs other duties relating to surveying work as directed by CHIEF OF PARTY (profess. & kin.).[19]

12. The *Dictionary of Occupational Titles* does not define the term "laborer." It defines "Construction Worker II (construction)" as follows:

> Performs any combination of following tasks, such as erecting, repairing, and wrecking buildings and bridges; installing waterworks, locks, and dams; grading and maintaining railroad right-of-ways and laying ties and rails; and widening, deepening, and improving rivers, canals, and harbors, *requiring little or no independent judgment*: *Digs, spreads, and levels dirt and gravel, using pick and shovel.* Lifts, carries, and holds building materials, tools, and supplies. Cleans tools, equipment, materials, and work areas. Mixes, pours, and spreads concrete, asphalt, gravel, and other materials, using handtools. Joins, wraps, and seals sections of pipe. Performs variety of routine, nonmachine tasks, such as removing forms from set concrete, filling expansion joints with asphalt, placing culvert sections in trench, assembling sections of dredge pipelines, removing, wallpaper, and laying railroad track. Many of these jobs are not full time; project size and organization of work determine whether workers spend their time on one job or transfer from task to task as project progresses to completion. Some workers habitually work in one branch of industry, whereas others transfer according to availability of work or on seasonal basis. Work is usually performed with other workers.

The definition of Construction Worker II goes on to list a number of designations related to the specific work such workers may perform. The listed designations include "Grader (construction)" and "Grade Tamper (construction)." None of the listed designations refer to "surveyor" or to survey work in any way.[20]

13. During the time period relevant to this case, Erik Oelker was the lead prevailing wage investigator at DOLI. Mr. Oelker was responsible for providing technical assistance to stakeholders, participating in the wage data survey process, and reviewing and certifying prevailing wage rates under Minn. R. 5200.1030, subp. 2a(C).[21] In February of 2009, Mr. Oelker suffered a traumatic brain injury. As of the hearing in this matter, he was unable to work and was on an extended medical leave. Mr. Oelker did not testify at the hearing in this matter.[22]

14. During the time period relevant to this proceeding, there was not a formal process followed at DOLI to carry out its obligation under Minn. R. 5200.1030, subp. 2a(C), to "review and certify" wage rates that were assigned by Mn/DOT as the

[19] Ex. 115 (emphasis in original).
[20] Ex. 115 (emphasis added).
[21] T. 187-90.
[22] T. 215-16.

contracting agency. It was typical during that time for Mr. Oelker and Mn/DOT representatives to engage in informal discussions regarding prevailing wage issues, and for nothing to be issued in writing by DOLI stating that a wage rate assigned by Mn/DOT was appropriate based on the most similar trade or occupation from the area wage determination.[23]

B. Surveying Work and Prevailing Wage Requirements

15. The U.S. Department of Labor has long taken the position that "preliminary survey work, such as the preparation of boundary surveys and topographical maps, is not construction work covered by the Davis-Bacon Act, especially when performed under a separate contract. Thus, the Davis-Bacon prevailing wage requirements generally would not apply to such survey crew work."[24] The only exception to this interpretation has existed with respect to certain projects that receive federal assistance from the U.S. Department of Housing and Urban Development under statutory provisions that are broader in scope.[25] Under the U.S. Department of Labor's longstanding interpretation, surveying performed immediately prior to and during actual construction, in direct support of construction crews, is covered by the Davis-Bacon requirements for laborers and mechanics. However, "[t]he determination of whether certain members of survey crews are laborers or mechanics [within the meaning of the Davis-Bacon Act] is a question of fact [which] must take into account the actual duties performed. As a general matter, an instrumentman or transitman, rodman, chainman, party chief, etc. are not considered laborers or mechanics. However, a crew member who primarily does manual work, for example, clearing brush, is a laborer and is covered for the time so spent."[26]

16. The above U.S. Department of Labor interpretation stems in part from the definition of the term "laborer or mechanic" contained in federal rules. In relevant part, those rules define laborers and mechanics as follows:

> The term laborer or mechanic includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. . . . The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity . . . are not deemed to be laborers or mechanics.[27]

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[23] T. 75, 207-08, 343.
[24] Ex. 104 at 1-2; *accord* Ex. 105 at 2 and 3.
[25] Ex. 104 at 1-2.
[26] *Id*. at 2; *accord* Ex. 105 at 2 (DBA applies to "survey crew members who perform primarily manual work on the job site, such as clearing brush or sharpening stakes" but does not cover "crew members whose duties are primarily mental in character") and Ex. 105 at 3 (DBA applies to "survey crew members who perform primarily manual or physical duties, such as brush cleaning or sharpening stakes," but does not apply to crew members "performing primarily professional or subprofessional work").
[27] *Id*.; 29 C.F.R. 5.2(m).

To be considered exempt executive, administrative, or professional employees, the U.S. Department of Labor rules generally require that employees meet certain minimum tests related to their primary job duties and, in most cases, be paid on a salary basis at not less than minimum amounts. The exemption does not apply to manual laborers or other blue-collar workers who perform work involving repetitive operations with their hands, physical skill, and energy.[28]

17. Prior to the late 1990's, land surveying work on Mn/DOT highway projects either was performed by Mn/DOT employees or by surveying crews that were hired by Mn/DOT under a separate contract.[29] Prevailing wages were not paid to Mn/DOT employees performing surveying work because State employees are not subject to the requirements of the PWA.[30] There is no evidence that survey crews hired by Mn/DOT under separate contracts were required to be paid prevailing wages.

18. Beginning in the late 1990's, Mn/DOT began to examine the concept of "contractor construction staking," i.e., having the prime contractor hire its own survey crew to do surveying work on construction projects.[31] On July 17, 1998, David Ekern, Director and Assistant Chief Engineer of Engineering Services at Mn/DOT, issued Technical Memorandum No. 98-18-RWS-01 (the "1998 Technical Memorandum") relating to construction surveying. In essence, the memorandum allowed general contractors to hire private survey companies as subcontractors and pay for them under the prime contract. The memorandum indicated that, "[i]n order to supplement Mn/DOT's work force capabilities in the area of construction surveying, private contractor construction surveying may be authorized in new Mn/DOT construction contracts." For this reason, the memorandum stated that standard specifications for construction surveying would be added to construction contracts requiring this type of construction project work. Among other things, the memorandum indicated that contractors "shall provide material, labor, equipment, and documentation necessary for construction surveying and for producing the as-built Plan," and shall "retain a Professional Land Surveyor or Professional Engineer, licensed in the State of Minnesota, to directly supervise the construction surveying." The technical memorandum stated that, unless superseded, it would expire on July 16, 2003.[32]

19. On July 27, 2005, Technical Memorandum No. 05-08-RWS-01 (the "2005 Technical Memorandum") was issued by Richard Stehr, Division Director of Engineering Services at Mn/DOT. The 2005 Technical Memorandum superseded the 1998 Technical Memorandum and applied to all construction projects commencing after March 1, 2006. The 2005 Memorandum continued to note that private contractor construction surveying may be authorized in Mn/DOT construction contracts. It also stated that, "for projects let after August 31, 2007, an individual holding a NSPS – ACSM Level III shall be on the Project site at all times to directly supervise the survey crew(s)." This refers to the Level III Certified Survey Technician certification given by

[28] Ex. 104 at 2; *see* 29 C.F.R. 541.700 -541.701.
[29] T. 128, 148.
[30] T. 34, 128-29.
[31] T. 148.
[32] T. 37-39; Ex. 4.

the National Society of Professional Surveyors.[33] In order to qualify as a Level III CST, individuals are required to have 7,000 hours, or 3½ years, of experience and pass an examination.[34]

20. Mn/DOT was unable to locate a technical memorandum that was in effect between the July 2003 expiration date of the 1998 Technical Memorandum and the March 1, 2006 effective date of the 2005 Technical Memorandum. Counsel for Mn/DOT represented that "the policy of the Department never changed" even if no formal technical memorandum was in effect during that time.[35]

21. Both the 1998 Technical Memorandum and the 2005 Technical Memorandum discussed the basis of payment by Mn/DOT of construction surveyors, the payment schedule, and payment for extra work. However, neither Memorandum stated that survey crews would have to be paid prevailing wages under the PWA nor discussed any classification that would be applicable to field survey technicians or field survey members.[36]

II. Trunk Highway 212 Prime Contract and Land Surveying Subcontract

22. On or about May 13, 2005, Mn/DOT and Zumbro River Constructors ("ZRC") (a joint venture of Fluor Enterprises, Ames Construction, and Edward Kraemer & Sons)[37] entered into a design-build contract in the amount of $237,893,000 for the design and construction of an 11.75-mile trunk highway within the city limits of Eden Prairie, Chanhassen, Chaska, and Carver in Hennepin County and Carver County ("the Project" or "the TH 212 Project"). The Project included grading, surfacing, noise berms, noise walls, ponds, signals, lighting, signing, and bridges.[38]

23. Prior to submitting its price proposal to Mn/DOT for the TH 212 Project, ZRC solicited bids for the surveying work on the Project. Hansen Thorp Pellinen Olson, Inc. ("HTPO") expressed interest in the project.[39] HTPO is a firm that provides civil engineering, land surveying, and landscape architecture services. HTPO carries professional liability insurance and is taxed as a personal services corporation. The personal services corporation tax rate applies to corporations providing professional services, such as accountants, attorneys, engineers, and architects.[40] HTPO's

[33] Ex. 4A; T. 488-94.
[34] T. 493-97; Ex. 132.
[35] T. 492.
[36] Ex. 4 at 8; Ex. 4A at 6.
[37] T. 272.
[38] Ex. 1 at 1, 35; T. 20-22. A design-build contract is one in which Mn/DOT enters into a contract with a general contractor who, with the assistance of designers, project planners, and subcontractors, designs the project from scratch (or based on partial plans previously developed by Mn/DOT) and then builds the project. This differs from the traditional design-bid-build contract, where Mn/DOT designs the plan and puts it out for bids, and contractors submit bids based on Mn/DOT's plans and specifications. T. 22, 162-63.
[39] T. 263, 270-71, 395.
[40] T. 654, 658-62; Exs. 107, 108.

President, Laurie Johnson, has been a licensed professional engineer since 1997.[41] Daniel Thorp, Vice President of HTPO, has been a Registered Land Surveyor since 1981 and manages HTPO's surveying activities in the field and in the office.[42] HTPO does not employ any individuals who are classified or called "laborers" or "mechanics."[43]

24. During pre-bid meetings, Mn/DOT did not discuss with ZRC whether land surveyors used on the Project would be subject to prevailing wage requirements. Neither the price proposal that ZRC submitted to Mn/DOT nor the proposal that HTPO submitted to ZRC assumed that prevailing wages would be paid to land surveyors.[44]

25. Scott Risley, a licensed professional engineer, was the Project Manager for ZRC on the Project and was responsible for the overall execution and management of the TH 212 Project. Mr. Risley put together ZRC's bid and developed its price proposal for the Project. Mr. Risley had worked for Fluor Enterprises on highway construction projects for almost 17 years. He was familiar with the practice of land surveying on highway construction projects as well as prevailing wage requirements in federally-funded projects and projects in other states. Based on his experience, Mr. Risley did not expect while negotiating the ZRC contract that prevailing wages would be required for land surveyors working on the TH 212 Project.[45]

26. Prior to working on the TH 212 Project, HTPO had performed approximately 50% of its work on publicly-owned projects and the other 50% on privately-owned projects.[46] HTPO had worked on many projects for which the contracts contained language relating to state PWA and federal DBA requirements.[47] HTPO's public work had included several projects for the State of Minnesota, including the Judicial Center, the History Center, and other projects, as well as work for the State Administration Department. HTPO had also performed work for counties, municipalities, the Metropolitan Council, and the Metropolitan Airport Commission. Public work previously performed by HTPO included infrastructure improvements, roadways, utilities, park work, road construction, topographic surveys, construction staking for State buildings, airport runway improvements, taxiway improvements, park-and-ride for the Metropolitan Transit Authority, and construction staking for county jails.[48]

27. Prior to this Project, HTPO had never been required to pay field survey crews prevailing wages for any work performed on other public projects or been the subject of a prevailing wage investigation.[49] Ms. Johnson and Mr. Thorp believed that individuals working on survey field crews were not "laborers" or "mechanics" within the

[41] T. 653.
[42] T. 389.
[43] T. 392, 657.
[44] T. 270-71, 395.
[45] T 258, 261-62.
[46] T. 655.
[47] T. 390.
[48] T. 391-92, 655-57.
[49] T. 393, 656, 662.

meaning of the PWA and that the PWA did not apply to survey field crews.[50] They were not aware of any previous attempts by Mn/DOT to enforce the PWA as to survey field crews.[51]

28. After ZRC was awarded the contract with Mn/DOT on the TH 212 Project in March 2005, ZRC began to execute its subcontracts with selected subcontractors. HTPO was selected by ZRC to perform the surveying work related to roadway construction, grading, and paving on the Project. ZRC selected another firm, EVS, to provide survey work relating to structures (bridges, culverts, etc.) on the Project.[52] Subcontractors were required to comply with the terms of ZRC's prime contract with Mn/DOT. ZRC provided HTPO with a copy of the prime contract.[53]

29. In May 2005, ZRC and HTPO executed a subcontract in the amount of $2,251,590.[54] The subcontract between ZRC and HTPO incorporated the terms of the prime contract between ZRC and Mn/DOT, as did the subcontract between ZRC and EVS.[55] The heading on the first page of the subcontract indicated that it was for professional services.[56] Under the subcontract, HTPO was required to provide grade surveying and staking for multiple aspects of the Project, including ramps and loops, noise walls, ponds, sanitary and storm sewer, lighting, and guardrails. The subcontract was effective on August 25, 2005.[57]

30. Ms. Johnson of HTPO reviewed the proposed subcontract language between HTPO and ZRC before she signed the contract on behalf of HTPO.[58] She noticed that the prime contract and several exhibits were incorporated into the subcontract and reviewed all of those materials. She specifically reviewed the Master Job Classifications and the wages included in the prime contract and noticed that there were no wages included for survey field crews.[59] She also reviewed the statutes and rules that were referenced in the contract, including the PWA and DOLI's rules under the PWA.[60]

31. Exhibit F-4 attached to the prime contract stated, "This project is covered by Minnesota prevailing wage statutes. Wage rates listed below are the minimum hourly rates to be paid on this project."[61] Because federal aid was also provided for the project, the contract also contained federal prevailing wage rates.[62]

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[50] T. 392, 657-58.
[51] T. 393, 662-63.
[52] T. 263-64, 272-74.
[53] T. 274-75.
[54] T. 269; Ex. 101.
[55] T. 274-75, 586-88; Ex. 101 at HTPO 00355.
[56] Ex. 101 at HTPO 00351.
[57] Ex. 101 at HTPO 00351, 00352, 00355, 00357-00359; T. 272-73.
[58] T. 664; Ex. 101.
[59] T. 665-66.
[60] T. 758-59.
[61] Ex. 1 at F-4, p. 1.
[62] Ex. 1 at F-3; T. 24.

32. The prime contract listed the Master Job Classifications that were set forth in the DOLI rules in effect at the time and provided contractors with codes to use in classifying work. The listing of job classifications in the prime contract included more than 140 classes of work.[63] The total hourly wage rate (the basic rate plus the fringe rate) for Code 101 (Laborer, Common – general labor work) under the contract was $31.85 for the period of October 11, 2004 to May 1, 2005. That rate increased to $32.85 for work performed after May 1, 2005.[64] For Code 103 (Landscape Laborer), the initial total wage rate was $20.44.[65]

33. There was no language in the prime contract specifically relating to surveyors, and no job classification was listed for field survey technicians.[66]

34. The prime contract included the following Prevailing Wage Statement dated March 16, 1998:

> A recent unpublished decision of the Minnesota Court of Appeals, affirms the authority of the Minnesota Commissioner of Transportation to enforce the Minnesota Prevailing Wage Law on State Highway projects on a case-by-case basis. International Union of Operation [sic] Engineers, Local 49 vs. Minn. Dept. of Transportation, et al., Court of Appeals Case No. C6-97-1582, also see, Minn. Stat. §§ 177.43 and 177.44 (1996).
>
> The Department of Transportation will enforce the Minnesota Prevailing Wage Law in a manner consistent with the Court of Appeal's decision notwithstanding any prior notices on this subject. A copy of the Court of Appeal's decision is available to anyone who is interested in reviewing it. Please call Charles Groshens, Labor Compliance Unit at (651) 297-5716 to receive a copy.[67]

35. Work on the design of the TH 212 Project commenced immediately after the Mn/DOT-ZRC contract was executed in March 2005.[68] HTPO was part of the design team.[69]

36. The actual on-site construction on the Project did not begin until August 2005.[70]

37. The land survey work on the Project began during the summer of 2005 and was completed by September of 2008.[71]

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[63] T. 30-33; Ex. 1 at F-4; *compare* Minn. R. 5200.1100 (2007).
[64] T. 32-33.
[65] T. 33.
[66] T. 33, 61; Ex. 114.
[67] Ex. 1 at F-5. The Court of Appeals decision referenced in the contract is discussed in Finding 120 below.
[68] T. 269.
[69] T. 706.
[70] T. 269-70.

38. Construction of the Project was completed in November of 2008, when ZRC received its conditional final acceptance from Mn/DOT.[72]

39. Based upon HTPO's certified payrolls, HTPO's work on the Project commenced during the week ending May 22, 2005, and finished during the week ending November 30, 2008.[73]

III. Mn/DOT Prevailing Wage Investigation

40. Mn/DOT did not raise any issue regarding prevailing wages for HTPO's land survey field crews until more than a year after work had commenced on the Project.[74]

41. In November 2006, while investigating the application of the PWA to surveyors on the ROC 52 project in Olmsted County, Mn/DOT became aware of possible PWA issues involving the TH 212 Project. Mn/DOT Senior Labor Investigator Robert Richards was assigned to investigate both the ROC 52 and the TH 212 Project.[75]

42. The ROC 52 job involved ZRC as the general contractor and a different surveying subcontractor, Yaggy Colby. Mn/DOT's investigation of the ROC 52 project began in May 2006, in response to a complaint from a Yaggy Colby employee. Mn/DOT ultimately concluded that Yaggy Colby surveyors were subject to the PWA and that back wages were owing. Mn/DOT determined that the Code 101 Common Laborer classification was the most similar to the work performed by the Yaggy Colby surveyors. In calculating the back wages it contended were owing, Mn/DOT did not require all of the on-site land surveying activities that Yaggy Colby performed to be subject to the PWA.[76] Mn/DOT excluded the portion of the work performed by Yaggy Colby surveyors that was related to design rather than construction based on its determination that the design work was not work under the contract.[77] In addition, Mn/DOT did not require the "as built" time spent by Yaggy Colby surveyors to be covered by the PWA.[78] Although Yaggy Colby never agreed that its surveyors were subject to the PWA, it ultimately reached an agreement with Mn/DOT in approximately September of 2007 to pay survey crew members approximately $30,000 in additional wages in order to avoid legal expenses and resolve the dispute with Mn/DOT.[79]

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[71] T. 270.
[72] T. 269-70.
[73] Ex. 36.
[74] T. 264.
[75] T. 56-57, 222, 293; Exs. 117 at 1, 125 at 2, 3.
[76] T. 306, 600; Ex. 125 at 2-3.
[77] T. 224-27, 305-06; Ex. 29.
[78] T. 308. "As-built" measurements are measurements taken by surveyors to determine if the end result was different than the original plan. Any changes are reflected in the record.
[79] T. 298-300, 598-600; Ex. 125 (Ex. A).

43. As part of his investigation of the TH 212 Project, Mr. Richards reviewed the prime contract and HTPO's payroll records.[80] Mr. Richards visited the Project site two or three times for at least one hour each time. During those visits, Mr. Richards looked over the entire Project and did not focus solely on HTPO employees. He did not interview HTPO employees working on the site.[81]

44. Although Mr. Richards testified that he also reviewed the "Book of Occupational Titles" during his investigation and determined that the definitions of surveyor and laborer were similar,[82] this testimony is not credited because Mn/DOT admitted in response to Requests for Admissions served by ZRC and HTPO that "Mn/DOT did not consult the United States Department of Labor's Dictionary of Occupational Titles in connection with the Investigation, prior to issuing Robert Richards' letter dated June 19, 2007" or "prior to issuing Thomas Ravn's letter dated August 15, 2007."[83]

45. Since surveyors did not have their own classification in the Master Job Classifications list set forth in the DOLI rules at the time, Mr. Richards attempted to determine which of the existing classifications were the most same or similar trade or occupation. To Mr. Richards' knowledge, the only classes of labor identified on the Master Job Classification list that performed surveying tasks in conjunction with their classification were laborers, carpenters, cement finishers, ironworkers, and pipe fitters. Mr. Richards met with union representatives and reviewed apprenticeship programs associated with four of these five trades (laborers, carpenters, cement finishers, and ironworkers).[84]

46. Mr. Richards mistakenly believed that the apprenticeship agreement for the laborers union required that individuals receive 160 hours of training in field surveying,[85] rather than merely offering 40 hours of elective training in "instruments" and 40 hours of elective training in "line and grade."

47. Mr. Richards has never worked as a land surveyor or operated a Total Station or other equipment used by surveyors.[86] He did not consult with any land surveying professionals in reaching his determination that Common Laborer was the same or most similar trade or occupation to the survey crew.[87] He admitted that he was unfamiliar with the Total Station used by surveyors at the time.[88] Mr. Richards had some experience working as a laborer in the construction industry between 1965 and

[80] T. 234-35, 237, 289. Mn/DOT did not conduct an investigation of EVS, the other survey subcontractor on the TH 212 Project. The Project Engineer discussed the issue with EVS and EVS ultimately paid approximately $8,000 in back wages to employees who were determined to have been underpaid. T. 228-29, 330-31.
[81] T. 352-53.
[82] *See* T. 289, 314, 316.
[83] T. 78-79; Ex. 116 at 12 (Requests for Admission Nos. 5 and 6).
[84] T. 234-35, 312-13, 338.
[85] T. 236, 289, 339-40.
[86] T. 57, 290-91.
[87] T. 313.
[88] T. 291.

1973.[89] While Mr. Richards believes that Common Laborers perform tasks that are the same or similar to surveying (holding a rod and a tape measure; running a transit; clearing brush; putting in grade stakes; blue topping; and staking for water mains, bridges, concrete, bituminous, sewer lines, berms, and noise walls),[90] he acknowledged at the hearing that he was not qualified to testify about the nature of the field surveying work performed by Common Laborers.[91]

48. During the investigation, Mr. Richards contacted Erik Oelker at DOLI. Mr. Richards told Mr. Oelker that he had reviewed the apprenticeship agreements for the four trades and had determined that the apprenticeship program that was created by DOLI for laborers included "required" training on surveying work. Mr. Richards informed Mr. Oelker that he believed that the 101 Common Laborer classification on the existing Master Job Classification list was the most similar classification with respect to the duties performed by the surveyors on the TH 212 job. Mr. Oelker told Mr. Richards that he concurred.[92] Mr. Richards did not have any contact with anyone else at DOLI regarding this issue.[93]

49. Neither Erik Oelker nor anyone else at DOLI ever certified or confirmed in writing that DOLI believed that Common Laborer was the most same or similar trade or occupation to survey field crews.[94] Mr. Richards generally did not receive written confirmation from Mr. Oelker during this time frame.[95]

50. After reviewing the payroll records, Mr. Richards prepared an analysis of back wages owed to the HTPO workers on the Project. Mr. Richards' initial calculations of back wages were based solely on field survey employees and did not encompass office employees. It was Mr. Richards' understanding that HTPO employees involved in design work were not included in the certified payrolls submitted for field employees.[96] He did not perform any independent investigation to determine the actual tasks that HTPO's employees performed with respect to the certified payrolls that were submitted for HTPO's field activities[97]

51. Because Mr. Richards did not consider travel between HTPO's main office and the work site to be "work under the contract" subject to the requirements of the PWA, he factored out estimated travel time for each worker of seven minutes per day.[98] Mr. Richards' calculation of travel time credit was based on an estimate by one of the

[89] T. 219-21.
[90] T. 339-42.
[91] T. 314.
[92] T. 235-36, 289. Mr. Richards had previously made the same recommendation regarding the ROC 52 project, and Mr. Oelker had also concurred with respect to that determination. T. 224-226.
[93] T. 300.
[94] T. 75-76, 208, 300.
[95] T. 207-08, 343.
[96] T. 310-11.
[97] T. 311.
[98] Ex. 3; T. 239-40.

HTPO crew chiefs of the amount of time it would take to travel from HTPO's office to the nearest point of the Project site.[99]

52. In calculating the back wages he believed were owing under the PWA, Mr. Richards used the Common Laborer wage rate of $31.85 (basic rate of $23.59 plus fringe benefits of $8.26). He concluded that HTPO owed $207,671 in total back wages.[100] He applied the same wage rate to all of HTPO's employees regardless of work performed.[101] Mr. Richards believed that the total he calculated did not include time spent on design work.[102] However, some design-related work was included in the certified payrolls provided by HTPO, such as a boundary topographical survey conducted toward the end of the project, and monitoring for the settlement plates and the walls.[103]

53. By the time formal letters were written in January of 2007 concerning the prevailing wage issue, approximately 70% of HTPO's work on the Project had been completed.[104]

54. In a letter dated January 3, 2007, almost a year and a half into construction of the TH 212 Project, ZRC informed HTPO President Laurie Johnson that Mn/DOT had performed payroll audits and had taken exception to the certified payrolls provided by HTPO for the TH 212 Project because HTPO had been paying its workers every two weeks instead of every week as directed by federal contract provisions. ZRC requested that HTPO respond to the issue by February 2, 2007.[105]

55. By letter dated January 12, 2007, Mn/DOT Project Manager Jon Chiglo informed ZRC (apparently in response to a question raised by ZRC at a January 10 meeting) that the "rod man that is working in conjunction with grading fall[s] under the 101 laborer classification."[106] ZRC forwarded a copy of Mr. Chiglo's letter to HTPO on January 18, 2007.[107]

56. HTPO responded on February 5, 2007. In its response, HTPO contested Mn/DOT's position that surveyors are subject to the PWA. HTPO argued that the PWA applied only to "mechanics and laborers" and was not applicable to design professionals like HTPO. HTPO emphasized that it is classified by the IRS as a professional services corporation and pays the higher tax rate for professional services. HTPO indicated that its contract with ZRC encompassed the performance of professional services and emphasized that it carries professional liability insurance on every dollar that it bills, including the work of its surveyors and survey assistants. HTPO clarified that it did not employ "rod men." It also asserted that its work is regulated by the State Board of

[99] T. 239, 325-26.
[100] T. 241, 245. Mr. Richards did not adjust the wage rate upward as of May 1, 2005. T. 241.
[101] T. 309.
[102] T. 309-10, 345.
[103] T. 544.
[104] T. 399.
[105] Ex. 24-H.
[106] Ex. 24-E.
[107] Ex. 24-F; T. 335-36.

Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience and Interior Design, and that the grading work done on the Project was "land surveying" as defined by that Board.[108]

57. ZRC provided a copy of HTPO's responsive letter to Jon Chiglo of Mn/DOT on February 6, 2007.[109] Mr. Chiglo, in turn, forwarded HTPO's letter to Charles Groshens by email dated February 8, 2007, and asked Mr. Groshens to let him know how he would like Mr. Chiglo to proceed.[110]

58. On June 19, 2007, Mr. Richards sent a letter to ZRC in which he continued to assert that the PWA applied to HTPO employees working on the TH 212 Project. Mr. Richards indicated that Mn/DOT determined what HTPO work is subject to the PWA and the contract provisions by considering: (1) if the contract was funded in whole or in part with state funds (Minn. Stat. § 177.41); and (2) if the contractor was performing work under the contract (Minn. Stat. § 177.44, subd. 1 and Minn. R. 5200.1106, subp. 2). He stated that, with respect to HTPO, Mn/DOT decided both questions in the affirmative. Mr. Richards then indicated that a number of labor classifications specified in the Master Job Classification list perform surveying duties that are in direct support of on-going construction activities, including Common Laborers, Ironworkers, Carpenters, and Pipe Layers. Finally, Mr. Richards stated that, "[b]ased on the information and work duties presented in this case, it appears that the Common Laborer classification is the same or most similar trade or occupation for the work performed by the employees of HTPO." He noted that Mn/DOT had requested and received payroll spreadsheets from HTPO detailing each employee who performed work under the contract and an audit report demonstrating the amount owed to each employee.[111] Mr. Richards' June 19, 2007, letter is nearly identical to a June 7, 2007, letter sent by Clancy Finnegan, another Mn/DOT investigator, to EVS and the City of Bloomington, and to a June 25, 2007, letter sent by Mr. Richards to EVS.[112]

59. On July 19, 2007, counsel for HTPO sent a letter to ZRC responding to Mr. Richards' letter of June 19, 2007. In the letter, HTPO reiterated that its surveyors are design professionals, not laborers, and asserted that the PWA does not apply to them. HTPO insisted that there was no listing in the Master Job Classification that applied to its employees and the work that they do. The company referenced the U.S. Department of Labor's *Dictionary of Occupational Titles*, which classifies land surveyors and their assistants as professional occupations. If Mn/DOT refused to concede that the PWA did not apply to HTPO, HTPO contended that Mn/DOT must increase the contract price to compensate ZRC and HTPO for the increased costs. Finally, in

[108] Ex. 24-A; T. 658-62. *See also* Exs. 107 and 108. The practice of land surveying is the application of the principles of mathematics and physical and applied sciences and law to measuring and locating lines, angles, elevations, and natural or artificial features. Minn. Stat. § 326.02, subd. 4.
[109] Ex. 24-B (also Ex. 109).
[110] Ex. 24-C.
[111] Ex. 26.
[112] T. 300-04; *compare* Ex. 26 *with* Exs. 121 and 27.

accordance with the decision of the Minnesota Court of Appeals in *AAA Striping v. Mn/DOT,*[113] HTPO requested a contested case hearing.[114]

60. On July 20, 2007, Tim Odell, the Deputy Project Manager for ZRC on the TH 212 Project, sent a letter to Mr. Richards forwarding HTPO's response and indicating that ZRC supported HTPO's position on the surveyor classification issue.[115]

61. In a letter dated August 15, 2007, Thomas Ravn, Acting State Construction Engineer for Mn/DOT, informed ZRC that Mn/DOT's Office of Construction and Innovative Contracting had completed a review of HTPO's and EVS's certified payrolls. Mr. Ravn stated that the review confirmed that HTPO and EVS were not paying the prevailing wage rate to all of their employees as required by the contract. Mr. Ravn directed ZRC, as the prime contractor, to review the payrolls of HTPO and EVS and make the appropriate payments to the affected employees within 20 calendar days. The letter also informed ZRC that it could request an administrative hearing if it disagreed with the determination.[116]

62. By letter to Mr. Richards dated August 31, 2007, ZRC and HTPO again noted their disagreement with Mn/DOT's determination and requested an administrative hearing.[117]

63. Another firm, SRF, was part of the design team on the Project and performed surveying on the Project using field crews. Although some of the work performed by SRF was the same as the work HTPO's field crews performed, Mn/DOT did not require SRF to pay prevailing wages to its field crews.[118] The record does not contain any evidence explaining why SRF was not required to pay prevailing wages.

64. Mn/DOT also did not require that individuals employed by subcontractors of ZRC who conducted quality control and quality assurance testing of soils and materials used in the TH 212 Project be paid prevailing wages for their work.[119]

65. ZRC had a $200,000 allowance in its bid for additional landscaping at the discretion of the cities affected by the Project.[120] In a letter to Scott Risely at ZRC dated March 24, 2008, Charles Cadenhead at Mn/DOT stated that payment of the prevailing wage rate for work under the landscape allowance was not required because the

[113] 681 N.W.2d 706 (Minn. App. 2004).
[114] Ex. 27.
[115] Ex. 27 (also Ex. 111).
[116] Ex. 28 (also Ex. 112).
[117] Ex. 28 (also Ex. 113).
[118] T. 706-07.
[119] T. 619-20, 625-27. As explained more fully in Findings 125-26 below, the DOLI prevailing wage rule amendments effective in March of 2009 added a new code in Minn. R. 5200.1100, subp. 2 (2009) under the "laborers" classification for "quality control testers" and the Requests for Comments issued by DOLI in 2004 and 2006 indicated that DOLI was considering creating new classes for or altering the classifications applying to "quality testers." As a result, quality control testers were in a situation similar to that of survey technicians.
[120] T. 621.

additional landscaping was above and beyond what was required in the contract and was not paid via invoice by the State.[121] ZRC completed the additional landscaping work and paid its employees its own standard wage rate.[122] After the work on the additional landscaping work was completed, Mn/DOT changed its position regarding payment of prevailing wages for that work. A Design/Build Change Order issued by Mn/DOT on February 24, 2009, stated that Mn/DOT had determined that prevailing wage requirements did, in fact, apply to the landscaping work and directed ZRC to pay prevailing wages to those workers. Mn/DOT concluded that the additional prevailing wage cost justified payment as extra work and authorized payment to ZRC for the difference between the original wages it paid and the prevailing wages. The Change Order estimated that the additional amount to be paid ZRC was $20,803. ZRC signed the Change Order on March 19, 2009.[123]

IV. HTPO's Surveying Duties on the Project

66. Geodetic surveying takes the shape and curvature of the earth into account to obtain an accurate location on the earth's surface.[124] Licensed land surveyors locate objects on, above, and below the earth's surface and map them, locate boundaries, set monuments and corners, and create grading plans.[125]

67. Land surveying is a regulated profession, and land surveyors can be subject to professional liability for errors they make in their work. If a land surveyor's work does not satisfy the required standard of care, it may be necessary to remove the construction, re-stake, and rebuild. Such mistakes may cause delay in the project and corrections may be costly. Moreover, a land surveying error at one point in the project can have consequences throughout the construction of the project. For example, if a surveyor sets one elevation wrong and the error is not caught, the mistake can affect the elevations at which the entire project is constructed.[126]

68. Survey crews on highway construction projects generally first establish and verify control networks, add additional control points if necessary, determine which trees and shrubs have to be removed and mark them for clearing and grubbing, and slope-stake the job to guide the rough grading of the project.[127] As the project progresses, survey crews provide "blue top" stakes to guide the more detailed grading of the project, provide paving hubs/lines to guide concrete or bituminous paving, and stake for sewer, gutter, retaining walls, and storm sewers, as appropriate. Throughout the course of a project, survey crews check and verify existing conditions, and it is not uncommon for them to "design on the fly in the field" in order to make elements fit.[128] In addition, surveyors on highway projects may stake working points for bridges to guide

[121] Ex. 127; T. 621-22.
[122] T. 623-24.
[123] Ex. 128; T. 623-24.
[124] T. 158-59.
[125] T. 139.
[126] T. 164-65, 831-32.
[127] T. 140.
[128] T. 140-41.

construction bridges; take measurements to confirm that a project was built within specifications and that the correct amount was paid to the contractor based upon pay quantities (how much concrete was installed and how much dirt was moved, etc); take "as-built" measurements to determine if the end result was different than the original plan and reflect those changes in the record; mark final right-of-ways; and add additional control points for future use.[129]

69. Surveying done in support of construction projects is no different than other surveying. The same activities, depending on why and when they are being performed, could qualify as design, construction, or right-of-way surveying.[130]

70. In conducting its surveying work on the Project, HTPO personnel typically worked in two-person crews composed of a "crew chief" and a "survey assistant." The crew chief was in charge of making sure the work was done correctly, and the survey assistant performed different tasks depending on what the crew chief felt was necessary. Typically, the survey assistant operated the instrument and the data collector, and the crew chief (situated at the other end where he could see what was going on) moved the hub, set points, drove lath into the ground, marked lath, and directed the project. Accuracy and precision are important in this work.[131] HTPO does not call any of its employees a "rodman" and none of its employees are limited to holding a level rod or the "zero end" of a tape measure.[132]

71. Two HTPO employees provided a demonstration during the hearing to show how an HTPO survey field crew would set up and operate its equipment to lay out and stake for the construction of a retaining wall based on two known points. During the demonstration, they employed the same techniques and equipment that HTPO crews used for tasks performed on the 212 Project (a Total Station, a backsight, and a data collector).[133] They demonstrated how to establish "control," i.e., where they are positioned on earth in relation to the project plans;[134] how to use a total station and a backsight for reference,[135] and how to level the equipment to ensure that it could take precise and accurate measurements.[136] They also showed how a prism target similar to a backsight is used to determine distance from a total station;[137] how a data collector is used to calculate points and elevations;[138] how an offset is set up from a known point;[139]

[129] T. 141-43.
[130] T. 160-61.
[131] T. 400-03, 446-49, 830-31, 840.
[132] T. 400-01, 403, 448-49.
[133] T. 413-54.
[134] T. 417-19.
[135] T. 420-21.
[136] T. 421-23.
[137] T. 427-32.
[138] T. 427-32.
[139] T. 433-34.

and how staking would be done and lath would be marked.[140] The demonstration accurately reflected how work was done by HTPO surveyors on the TH 212 Project.[141]

72. Mr. Thorp, Kenneth Whitehorn, and Ted Anderson were the only licensed surveyors working on the Project for HTPO.[142]

73. Entry level people hired by HTPO to perform survey work do not take any course of study before they go out on the project. They receive on-going training from HTPO as soon as they start working in the field.[143] As employees gain knowledge and experience, they work their way up to the crew chief position.[144] The work performed by crew chiefs involved a significant degree of mental work.[145]

74. The primary equipment used by HTPO crews were GPS units that were accurate in precision to about the size of one golf ball;[146] standard and robotic Total Stations;[147] backsights;[148] prisms;[149] optical automatic levels;[150] and data collectors.[151] The equipment is used by surveyors to orient themselves to previously-established control points and identify their point in space, both horizontally and at the proper elevation. As part of their work on various tasks, HTPO's survey crews marked lath using a particular nomenclature to communicate precise information to the construction crews about how to use the plotted survey information to construct the Project at the appropriate horizontal location and elevation.[152]

75. Decades ago, surveyors would operate in 3- or 4-person crews and one or two of the crew members would perform only manual labor. However, technological advances have changed the way surveying is done. None of the HTPO field crew members working on the Project performed primarily manual work, such as swinging a hammer, clearing brush, or pounding stakes. There was no field crew member whose job was only to sharpen stakes or pound the lath. In fact, HTPO's stakes come pre-sharpened, and crews spent no more than 3% of their time actually pounding stakes into the ground.[153]

76. HTPO's surveying work on the TH 212 Project was organized according to phase codes that were established in early August of 2005.[154] In order to track the time

[140] T. 439-42.
[141] T. 552, 562, 564, 613.
[142] T. 527.
[143] T. 540.
[144] T. 402.
[145] T. 830.
[146] Exs. 139-40; T. 459-60.
[147] Exs. 137-38, 145-46; T. 454-56.
[148] Ex. 144.
[149] T. 456-57.
[150] Ex. 141; T. 461.
[151] Ex. 138; 455-57.
[152] T. 441-45, 463-85, 830-31.
[153] T. 487-88, 723, 840-41.
[154] Ex. 129; T. 463-64.

spent on different phases of the Project, HTPO employees reported their time using the following codes, depending upon the particular survey tasks that they were performing:

a. Slope Stakes: This is a method used to determine where the existing ground meets the proposed slope for the project in order to mark off the start of grading on the project. HTPO's two-person crews performed the slope staking for the first mile of the TH 212 Project using a standard Total Station, a backsight, and a data collector.[155]

b. Blue Top Sand: After most of the sand is placed by others on the project, HTPO determined the grade where the sand was supposed to be and placed a stake called a "blue top" so that the sand could be finished to that level. HTPO performed this work using a GPS unit by turning an angle, measuring, driving the stake, and then measuring the elevation of the stake and adjusting it up or down to the proper elevation.[156]

c. Blue Top Base: The process used to blue top base is similar to that used to blue top sand, but the work is done at a higher elevation because the base is placed in the layer above the sand.[157]

d. Concrete Stakes: To guide other contractors in trimming the rock and pouring the concrete to the right elevation, HTPO computed an extension grade between two ends of the proposed concrete by extending one end out 20 feet and the other out 7 feet. HTPO set stakes and marked lath with information for the concrete subcontractor. A robotic Total Station was typically used for this work. The concrete subcontractor thereafter ran a string line from the stakes set by HTPO.[158]

e. Walls: HTPO crews used a Total Station and a backsight to set 2-4 control points for retaining walls and sound walls on the Project and marked lath with information in order to guide other subcontractors who were building the walls. The information provided by HTPO included what the cut or fill would be to the proposed wall location vertically.[159]

f. Ponds: HTPO survey crews used GPS units to compute and set stakes for locations for various contours of storm water ponds that were then built by other subcontractors on the Project.[160]

[155] T. 464-66.
[156] T. 466-67.
[157] T. 467-68.
[158] T. 468-71.
[159] T. 471-72, 414-47.
[160] T. 472-73.

g. Intelligent Transportation Systems (ITS): Using a GPS unit, HTPO marked and set lath at locations where wires would be buried for ITS systems or where loops for the traffic would be located.[161]

h. Signs: HTPO used GPS units to stake speed limit and other signs to be located along the freeway, usually by marking a line and a sign number on the already-poured concrete. Subcontractors installing the sign would measure off the right distance and set their signs accordingly.[162]

i. Guardrail: HTPO computed the location of guardrails and used a GPS to mark the beginning and end of the guardrails on the concrete paving. The subcontractors installing the guardrails measured from HTPO's mark on the pavement to determine the actual location where the guardrail should be placed.[163]

j. Utilities: HTPO used GPS, standard Total Stations, and robotic Total Stations to locate the center of manholes at the bottom of the holes for storm sewer and sanitary sewer, the center of the openings of catch basins, the grade for all of the pipes coming in, and the percent of grades for the pipe going out. They marked lath with this information for other subcontractors to use in their construction. The utility work required a higher degree of vertical precision and a lesser degree of horizontal precision.[164]

k. Control: HTPO used and verified some control points set by SRF and Mn/DOT and also established its own preliminary control points throughout the entire Project using various equipment, including a digital level.[165]

l. Fence: HTPO located the anchor points of the fences along the side of the freeway and some points on line in the middle if it was a long straight fence. To do this work, HTPO computed coordinates in the office for the location of the fence, compared it to the boundary survey for the fence to ensure that the coordinates matched the land Mn/DOT had. In the field, HTPO measured the right-of-way stakes to make sure the fence was inside the right-of-way and, after verifying the right-of-way, laid out the fence. To perform this work, HTPO used GPS units if tree cover was not in the way, and put up a lath setting the actual corners of the fence.[166]

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[161] T. 473-74.
[162] T. 474.
[163] T. 474-75.
[164] T. 475-77.
[165] T. 417-20, 477-78.
[166] T. 478-79.

m. Light Poles: HTPO determined the location of the large concrete bases for the overhead light poles and street lights on the Project using GPS and provided subcontractors building them with an offset and a grade for the top of the concrete base.[167]

n. As-builts: Surveying for "as-builts" involves measuring and recording the location of items after construction is completed. On the TH 212 Project, most of HTPO's work for as-builts involved having the utility locator person go out and mark where the ITS lines were actually set, and then sending out an HTPO crew to actually measure the coordinates of the location.[168]

o. Restakes: If HTPO's stakes in connection with any of the above phases were knocked out by others working on the project, HTPO crews would repeat the entire staking process using the same equipment described above or, occasionally, merely reset the lath with the grade on it.[169]

The phase codes used by HTPO for the Project also included Office Computation, Administration, and Expense codes which did not involve field work done by field crews.[170] Although a code was assigned for Striping, HTPO did not end up doing any striping on the Project.[171] HTPO's field work on the Project also included locating leafy spurge (a noxious weed) on the Project and putting in lath using GPS units; monitoring retaining walls by setting up and measuring control points periodically to verify that they were not moving; and monitoring the elevation of plates for settlement to ensure the ground underneath was compressed. Equipment used for monitoring included the Total Station and an automatic level.[172]

V. Training of and Nature of Work Performed by Common Laborers, Landscape Laborers and Surveyors

77. The Laborers District Council of Minnesota and North Dakota is the union that represents construction craft laborers in Minnesota and North Dakota. The District Council has approximately 11,000 total members, over 10,000 of whom live in Minnesota. Approximately 950 employers that employ construction laborers are signatories to collective bargaining agreements with the Laborers District Council. Members of the laborers' union include Common Laborers, Skilled Laborers, and Landscape Laborers.[173]

[167] T. 479-80.
[168] T. 480-81.
[169] T. 481-82.
[170] T. 482.
[171] T. 477.
[172] T. 482-85.
[173] T. 359, 361.

78. The collective bargaining agreements for the highway heavy and commercial building construction industry in Minnesota require that newly-hired laborers must complete a mandatory apprenticeship program that is approved by DOLI. The program requires the completion of 288 hours of classroom training and 4,000 hours of on-the-job training.[174] Landscape Laborers are covered under a separate collective bargaining agreement. Although they are not currently required to participate in the mandatory State-approved apprenticeship program, they can, and do, take courses at the laborers' training center.[175]

79. In addition to the required training courses, laborers may choose from several elective courses offered at the laborers' training center. The two courses relating to setting construction grade that are offered at the center are both electives. The "instruments" course (40 hours in length) is introductory in nature and familiarizes laborers with construction mathematics and the types of instruments involved in setting grade and hub points. The "line and grade" course (also 40 hours in length) is somewhat more advanced and teaches skills specifically related to grading on highway heavy projects. Each of these classes involves some classroom training and some practical training.[176] All laborers, including Landscape Laborers and highway heavy laborers, would have access to this training. More than 500 laborers have received training in one or both of these classes since 2000.[177] However, it would be possible for a laborer to complete his or her training and never take either of these classes.[178]

80. There is no evidence regarding what specific instruments laborers are trained to operate if they choose to take the "instruments" or "line and grade" classes, what tasks they are trained to perform, or what grade they must receive to be considered to have successfully completed these classes.[179] In addition, there is no evidence that the State Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience and Interior Design certifies the training that laborers receive.[180] Once laborers have completed the classroom and on-the-job training to be admitted to the union, they are not required to take continuing education to maintain their union membership.[181]

81. Laborers are eligible for dispatch out of the local union hiring hall based on skills that they have completed. If an individual successfully completes the "instruments" or the "line and grade" course, a notation is added to their skills card confirming the completion of those courses, and the individual could be dispatched if there is a specific request from a contractor for a union employee to perform grading or

[174] T. 360-63, 493-94; Exs. 132, 133.
[175] T. 362-63.
[176] T. 363-65, 369-72.
[177] T. 367, 376-77.
[178] T. 375.
[179] T. 369, 371.
[180] T. 379.
[181] T. 379-80.

line and grade work.[182] There is no evidence how often laborers are dispatched to perform that type of work.

82. The National Society of Professional Surveyors offers a Certified Survey Technician ("CST") designation. There are four levels of certification in either field work or office work. Mn/DOT currently requires that crew chiefs obtain Level 3 field track certification. To be certified at Level 3, individuals must have 7,000 hours of experience (3.5 years minimum) and pass an exam. Level 3 technicians must demonstrate a thorough knowledge of survey computations, types of field surveys, and field operations, and be well-versed in field note reduction and in-depth plan interpretation and preparation. They also must possess supervisory skills.[183] The questions in the CST Level 3 exam are quite involved, and it takes a significant amount of knowledge, studying, and experience to be able to pass that test.[184] It is likely that individuals who have merely completed the elective laborers union training on instruments and line and grade would not qualify for Level 3 CST certification.[185]

83. The work done by HTPO employees on the Project did not involve grass seeding, tree planting, sod laying, or other work commonly performed by Landscape Laborers,[186] or the significant physical labor or building activities commonly performed by Common Laborers.

84. Both Common Laborers and Landscape Laborers on State highway projects perform some tasks involving measuring and rely on the work of surveyors in performing their jobs.[187]

85. Common Laborers perform predominantly physical tasks to assist in building construction projects.[188] While surveyors use instrumentation to obtain precise and accurate locations, Common Laborers typically engage in simple measurements by essentially taking a ruler and measuring off the points previously located by the land surveyors to determine the proper elevation of gravel or location for work they are performing in the field. For example, laborers measure off of hubs set by surveyors to obtain elevations for gravel or to mark the locations where trees should be planted.[189] Laborers constructing a retaining wall after a surveyor has laid it out typically use a 4-foot carpenter's level or an automatic level, and they would level over and then measure down the distance that they were told to cut or fill.[190]

86. Some of the tasks that landscapers perform in highway construction are also comparable to those performed by surveyors.[191] For example, if a width is

[182] T. 369-70.
[183] T. 494-97; Ex. 132 at HTPO01036, 01037, 01045; Ex. 133.
[184] T. 497-98.
[185] T. 496-97.
[186] T. 557-58.
[187] T. 610-13.
[188] T. 645.
[189] T. 609-11.
[190] T. 452-53.
[191] T. 611-12.

specified in plans for sod (for example, off the back of a curb), Landscape Laborers measure with a ruler or a tape measure off the back of the curb to get their sod limits. Similarly, if there is a requirement for installation of trees, shrubs or bushes, Landscape Laborers may have a surveyor set a stake with an offset as to where the location of that tree is when they come in and install trees or shrubs. The Landscape Laborers would then measure with a tape off of that point to get the location of the tree. Landscape Laborers perform all sorts of measuring tasks that are no different than what Common Laborers do when measuring for the performance of their work.[192]

87. Neither Mr. Groshens nor Mr. Richards considered comparing survey field crews to Landscape Laborers. They also did not consider the monetary value of the wage rates when making their decision regarding the most similar classification.[193] The prevailing wage rate for the classification of Landscape Laborer was much closer to the rates that HTPO actually paid its survey field crews on the TH 212 Project than was the prevailing wage rate for the classification of Common Laborer.[194]

88. If HTPO were required to pay the Landscape Laborers' rate of $20.44, HTPO's workers in Billing Group 1 would need to be paid an additional $28,636.23. The total amount for all billing groups would be $31,728.21.[195]

89. The work performed by HTPO survey crews on the Project is as similar to work performed by those in the Landscape Laborer classification as it is to work performed by those in the Common Laborer classification.[196]

VI. Wages Paid to Survey Crew Members

90. The prime contractor and subcontractors on the Project were required to submit weekly certified payrolls for all employees working on the job that included the classifications of work performed, hours worked each day, and hourly wages.[197]

91. Tim Odell, the Deputy Project Manager for ZRC on the TH 212 Project, advised Mr. Thorp to segregate time spent by HTPO on the Project from time spent off the Project because, in his experience with prior prevailing wage issues, there was usually some distinction made between on-site and off-site work on the project. He believed separating out the time in this fashion would make the bookkeeping easier.[198]

92. Based upon HTPO's certified payrolls, HTPO's unlicensed survey crew members working in the field on the Project received wages ranging from $11.00 per hour with no fringe benefits to $37.32 per hour with $5.14 in fringe benefits.[199]

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[192] T. 611-13.
[193] T. 81-83, 99-100, 288-90, 328-30.
[194] T. 81-82, 328-30.
[195] T. 720-22; Ex. 151.
[196] T. 12-16.
[197] Ex. 1 at F-2, ¶ A-6; T. 26.
[198] T. 605-06.
[199] Ex. 33.

93. HTPO does not experience a lot of turnover with respect to its field survey crews and believes its wages and benefits are competitive with those of other companies.[200]

94. Mn/DOT did not present any wage data suggesting that survey field crews were typically paid more in 2005-2007 than HTPO paid,[201] or any evidence that HTPO's competitors paid entry-level field survey crew employees $31.85/hour in wages and fringes (the rate that applied to Common Laborers on the TH 212 Project) at that time.[202]

95. The wages HTPO paid to its field survey crews as of the beginning of the Project were similar to those paid by another survey firm (Sunde Land Surveying) to its field survey crews as of October of 2005. At that time, Sunde paid its survey crews wages ranging from $12 to $29 per hour, and fringe benefits ranging from $0 to $11.85.[203]

96. During 2005-2007, EVS, another land survey contractor that worked on the Project, paid its survey crews wage rates ranging from $17.50 to $32.85 per hour, and fringe rates ranging from $0 to $5.34.[204] While the fringe benefits rates paid by EVS were similar to those paid by HTPO, there were differences in the hourly wages. The lowest hourly wages paid by EVS were considerably higher than those paid by HTPO, and the highest hourly wages paid by HTPO were considerably higher than those paid by EVS.

97. During 2007, the Carver County Surveyor paid entry-level survey technicians $16.43/hour and its entry level Crew Chiefs $19.01/hour. The Carver County rate for entry level survey technicians was higher than HTPO's rates, and its rate for Crew Chiefs was comparable to that paid by HTPO.[205]

98. The 2004 federal minimum hourly wage rates set under the Service Contract Act for Hennepin, Carver, and other counties in the Twin Cities metro area for Survey Party Chief, Surveying Technician and Surveying Aide were $24.34, $18.59, and $16.16, respectively.[206]

VII. The Varying Positions of Mn/DOT regarding Surveyors

99. As discussed below, Mn/DOT has not applied the provisions of the PWA to those involved in survey work on State projects in a consistent fashion during the past decade. For example, at times, Mn/DOT has followed the interpretation of the U.S. Department of Labor under the Davis-Bacon Act; at other times (particularly in more recent years), it has not. In addition, Mn/DOT's interpretation of when and how the

[200] T. 499-500.
[201] T. 118.
[202] T. 505-06.
[203] T. 500-02; Ex. 130.
[204] T. 332-33; Ex. 125, Ex. D.
[205] T. 502-05; Ex. 131 (grades 10 and 12).
[206] T. 333-35; Ex. 126.

PWA applies to survey work has not always coincided with that expressed by DOLI officials.

100. Mn/DOT first addressed the issue of the applicability of prevailing wage requirements to surveying work in a November 24, 1999, letter to a project supervisor on a construction project receiving both federal and state funds. At that time, Catherine Peterson, then the Senior Labor Investigator at Mn/DOT, took a position consistent with the federal interpretation in response to the project supervisor's question about the applicability of prevailing wage requirements to surveyors employed by Gorman Surveying, Inc.[207] Ms. Peterson stated, in part:

> Under the provisions of the DBA, survey work that is performed immediately prior to or during the actual construction and which directly supports the construction crew is covered. Since the construction surveying performed by Gorman Surveying, Inc. is in direct support of the construction crew, the activity is covered by the DBA.
>
> However, certain survey crew members whose duties are professional or sub-professional are not considered laborers or mechanics, therefore, not subject to the wage determination. This includes workers employed by Gorman Surveying, Inc. to establish and/or level grades through the use of an instrument, transit, or rod.
>
> Workers employed by Gorman Surveying, Inc. to perform manual labor, such as clearing brush, checking grades, and sharpening stakes are covered by the wage determination.[208]

Ms. Peterson made no indication in the letter that any different interpretation would be applied under the Minnesota PWA.

101. By letter dated Oct. 22, 2001, to Mr. Groshens of Mn/DOT, David Kildahl of Widseth Smith Nolting (WSN) summarized an earlier discussion that had occurred in a conference call with Mr. Groshens and Dennis Ptacek in the Thief River Falls construction office. The discussion related to whether WSN employees "were doing the traditional survey work of a transit man and rod man, or were they doing laborer work that is subject to the prevailing wage schedule" on two state projects. Based on that discussion, Mr. Kildahl summarized his understanding for these two state projects and future work done by WSN as a subcontractor as follows:

> When we have a two-person crew, we should list one [on the certified payrolls] as a transit (or instrument) man, and the other as a rodman. We should not list them simply as survey technicians. You agreed that putting in a stake or a lath is a task incidental to the rodman's surveying function.

[207] Ex. 18.
[208] *Id.*; T. 100-02.

> When we have a third person on the crew, it is for the purpose of getting more work done in the time available. The third person can still be considered a rodman, provided that he or she is doing the same type of survey work as the rod person on a two-man crew. If this third person's job on the crew is strictly to pound stakes or do some other non-survey labor function, then that person should be classified as a laborer and paid according to the prevailing wage schedule.
>
> If we have four or more people on the job at once, we should indicate on the certified payrolls which ones are instrument people and which are rod people. This will help the Mn/DOT field inspector evaluate the payrolls and compare the payrolls to the labor interviews.

Mr. Kildahl urged Mr. Groshens to distribute clarification to all of the Mn/DOT Construction Offices regarding this issue and consider including clarification in the proposal documents to assist those bidding on this type of work.[209]

102. DOLI formed a Master Job Classifications Advisory Committee for the prevailing wage master job classifications that held public meetings on February 28, March 28, and April 30, 2002. William Bierman and Erik Oelker of DOLI and Charles Groshens of Mn/DOT participated in each of these meetings, as did representatives of various unions and construction contractors.[210] There was no mention of survey crews during the February or March 2002 advisory committee meetings. The April 2002 meeting included a very brief discussion of survey crews.[211] Mr. Groshens' comments suggested that, at the time, Mn/DOT believed that only a portion of the surveying work should be covered by prevailing wage requirements:

> I guess what we're having problems with, about a year or two years ago Mn/DOT put out a statement to allow for private entities to do a lot of our surveying in conjunction with our highway-heavy projects. Since then we have gotten numerous phone calls from counties, cities, our own people, even surveying companies wanting to find out exactly where their survey crews fall.
>
> As far as the feds are concerned, the transit person and also the rod person, the guy that's actually putting things to the right height, are not covered because they don't consider them to be laborers or mechanics, which is fine. The problem comes into trying to define the additional work that goes on amongst doing the surveying, such as string running, the pounding of the stakes, blue topping, that kind of stuff, so I just want to try and get some clarification if we can as to what should be covered, what shouldn't be covered now that we've got more and more of the private industry now doing the surveying in conjunction with our projects. . . . [S]ome of the crew functions are covered under prevailing wage laws such

[209] Ex. 19.
[210] Exs. 10, 11, and 12.
[211] Ex. 12 at 46-51.

> as the pounding of the stakes, blue topping, running string line, that kind of stuff, which traditionally has been a Common Laborers type operation, so that's where it's been sitting so far, but that's under the federal side and we haven't had any guidelines to follow under the state side.[212]

103. In an e-mail message to William Smith of the U.S. Department of Labor dated November 4, 2002, Mr. Groshens noted that he was having many problems with prevailing wage issues relating to surveyors and requested copies of any administrative decisions or similar information that would help define this area. In his response sent the same day, Mr. Smith told Mr. Groshens that "the survey crews are not covered under DB as long as they perform the work normally associated with surveying." Mr. Smith also provided Mr. Groshens with copies of opinion letters issued by the U.S. Department of Labor in 1993 and 1983 relating to coverage of survey crews under the DBA. These letters expressed the view that survey work performed immediately prior to or during actual construction, and which is in direct support of the construction activity is covered by the DBA. More specifically, the letters indicated that the DBA prevailing wage provisions apply to survey crew members who perform primarily manual work on the job site but did not apply to crew members whose duties are primarily mental, professional, or subprofessional in character.[213]

104. By letter dated January 13, 2003, Mr. Groshens responded to an inquiry dated July 31, 2002, from Mark Dierling of Short Elliott Hendrickson Inc. (SEH).[214] Mr. Dierling had informed Mr. Groshens of a wage rate issue that had arisen on a Duluth design-build project with respect to members of the SEH survey crew providing construction surveying and staking for the prime contractor. Mr. Dierling indicated that Mn/DOT field personnel had stated that members of the survey crew had to be paid the prevailing wage for Labor Code and Class 101 Laborer, Common, and expressed disagreement with that position. In his letter, Mr. Dierling referenced the U.S. Department of Labor and Industry's "Dictionary of Occupational Titles" and "Field Operations Handbook"[215] and argued that the survey crew members were not subject to prevailing wage requirements because none of them were primarily responsible for performing manual work.[216] In his response to Mr. Dierling's letter, Mr. Groshens first stated that, because Mn/DOT's federal-aid contracts are funded by both state and federal funds, the requirements of both the federal DBRA and the state PWA would have to be met. He acknowledged that the federal DBRA and the state PWA "are similar" but stated that the laws "do have their differences" and that "neither preempts the other." Mr. Groshens indicated that the federal materials cited by Mr. Dierling did

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[212] Ex. 12 at 46-47, 48; T. 111-13.
[213] Ex. 105 at 2, 3.
[214] Exs. 20 and 21 (see also Ex. 122).
[215] The U.S. Department of Labor's Field Operations Handbook stated, "The determination as to whether certain members of survey crews are laborers or mechanics is a question of fact. Such a determination must take into account the actual duties performed. As a general matter, instrumentman or transitman, rodman, chainman, party chief, etc., are not considered laborers or mechanics. However, a crew member who primarily does manual work, for example, clearing brush, is a laborer and is covered for the time so spent." Ex. 15, Field Operations Handbook, 6/29/90, at 15e19 (Survey crews).
[216] Ex. 20.

not apply in interpreting the state PWA. With respect to the federal prevailing wage requirements under the DBRA, Mr. Groshens stated that SEH would have to pay the appropriate prevailing wage rate to workers who are "performing manual labor prior to or during construction, such as clearing brush, checking grades, running string line, and sharpening & setting stakes." Mr. Groshens then distinguished the state PWA requirements from those under DBRA:

> The application of the state statute to your situation is somewhat different than under federal DBRA. The state statute requires any contractor or agent performing work under the contract to pay all employees the prevailing wage rate for the same or most similar trade or classification of labor and does not have provisions for exempting professional workers, as does the DBRA. The only exception allowed under the statute is for the manufacturing and delivery of materials by and for a commercial establishment.
>
> In your case, SEH is performing work under the contract in direct support of the prime contractor activities. Therefore, your employees performing the work are required to be paid the prevailing wage rate for the most similar classification of labor. Many of the listed classifications on the Master Job Classification list perform survey duties in direct support of the on going construction activities, such as but not limited to; ironworker would perform survey duties when setting iron, carpenter would perform survey duties when setting wood forms, pipe layer would perform survey duties when laying pipe etc. It is the contractor's responsibility to determine the classification of labor their employees are performing based on the Master Job Classification list.[217]

In the letter, Mr. Groshens mentioned that DOLI had started to promulgate new rules surrounding the surveyor issue but those rules had not been finalized, and asserted that, until those rules were promulgated, it was Mn/DOT's responsibility to enforce the PWA "on a case-by-case basis according to the plain meaning of the statute."[218] The letter accurately stated the position of Mn/DOT at that time.[219] Mn/DOT did not publicize this letter, nor was a rulemaking commenced to adopt this policy.[220] This appears to be the first time that Mn/DOT took the position that the reach of the PWA with respect to surveyors was broader than that of the DBA.

105. In 2003, Mr. Groshens and his staff at Mn/DOT drafted a "wish list" of changes they would like made to DOLI's rules under the PWA. Mn/DOT staff recommended that surveyors be given a separate classification in the Master Job Classification or that language be added to include surveyors in existing classifications,

[217] Ex. 21.
[218] *Id*. at 3.
[219] T. 51.
[220] T. 125.

such as Laborers, Ironworkers, or Carpenters. Mn/DOT brought this memo to the attention of Erik Oelker at DOLI.[221]

106. On November 1, 2004, John Chaffee and Tom Poul of the Minnesota Society of Professional Surveyors (MSPS) met with Mn/DOT representatives Richard Morey, Gary Thompson, and Betsy Parker to discuss MSPS's concerns about prevailing wage. Ms. Parker told MSPS that DOLI was beginning the process of creating some new rules relating to surveyors.[222]

107. The Fall 2004 issue of the Minnesota Surveyor (the official publication of the MSPS) included an article written by its president, John V. Chafee, about the efforts of the MSPS to resolve the prevailing wage issue as it applies to surveyors. Mr. Chaffee stated:

> In the past, it appears that MnDOT staff informally decided that surveyors are professionals rather than laborers or mechanics, and that the state prevailing-wage law does not apply to them. It also appears that MnDOT has the legal authority to make that decision. In the last few years, however, a different interpretation has sometimes been made. It originates with a small MnDOT bureau known as the Labor Compliance Unit (LCU). On some recent projects, the LCU has said that the person driving stakes is a "laborer" and should be paid the prevailing wage for construction laborers. Generally this announcement has been made after the projects are completed. Under the prevailing-wage rules, construction laborers receive a higher hourly rate on these projects than the wages of most private-sector field crew members and even some Licensed Surveyors.[223]

After discussing the wage rates set by DOLI for unskilled laborers and the average hourly wages listed by the Department of Energy and Economic Development for "surveyors" and "surveying and mapping technicians," Mr. Chaffee noted:

> As a result of the new prevailing-wage interpretation, private firms that bid on state staking contracts now have no way of knowing what wages they will be expected to pay. If they bid based on prevailing wage, they will probably not get the contract. If they assume that prevailing wage does not apply, they may be required to pay it retroactively after the project is done, thereby incurring a considerable loss.[224]

Finally, Mr. Chaffee mentioned that DOLI was considering adopting new rules that would make it clear whether surveyors are subject to the PWA and, if so, what their

[221] Ex. 16; T. 44-48.
[222] Ex. 5 at 2; T. 152.
[223] Ex. 5 at 2.
[224] *Id*.

wages should be. He noted that DOLI was accepting public comments on what the new rules should contain, and asked MSPS members to provide him with their thoughts.[225]

108. Mr. Thorp of HTPO was a member of the MSPS and typically received a copy of its publications, but does not remember seeing this article until it was disclosed by Mn/DOT prior to the hearing.[226]

109. On November 4, 2004, the U.S. Department of Labor issued a determination letter to the American Congress on Surveying and Mapping stating that it has been a longstanding position of the Department of Labor that preliminary survey work, such as the preparation of boundary surveys and topographical maps, is not construction work covered by the Federal Davis-Bacon Act, especially when performed pursuant to a separate contract.[227] The letter continued:

> Where surveying is performed immediately prior to and during actual construction, in direct support of construction crews, such activity is covered by Davis-Bacon requirements for laborers and mechanics. The determination of whether certain members of survey crews are laborers and mechanics is a question of fact. Such a determination must take into account the actual duties performed. As a general matter, an instrumentman or transitman, rodman, chainman, party chief, etc are not considered laborers or mechanics. However, a crew member who primarily does manual work, for example, clearing brush, is a laborer and is covered for the time so spent.[228]

110. The MSPS formed a Prevailing Wage Subcommittee to address the perceived problems with the application of the PWA to surveyors working on state-funded highway projects. The Subcommittee issued its findings on August 14, 2006, identifying three problems:

> a. First, the Subcommittee asserted that the comparison between the skills, duties, and educational background of survey personnel and union laborers was unrealistic. The Subcommittee argued that the prevailing wage law was enacted to make sure that union workers in the construction trades were paid a fair wage. According to the Subcommittee, surveyors should be exempt from the PWA because they are not in the construction trades and are not unionized.[229]
>
> b. The second issue addressed by the Subcommittee was that the wage rate for union laborers is considerably higher than the average wages and benefits paid to survey workers. The Subcommittee found that these higher prevailing wages, while nice for surveyors, actually drive up

[225] *Id.* at 2-3.
[226] T. 510-11.
[227] Ex. 104.
[228] *Id*.
[229] Ex. 135 at MDOT00199-00200.

the cost of constructing roads. The Subcommittee proposed establishing new labor classifications that are more consistent with the actual wages paid to surveyors.[230]

c. Third, the Subcommittee asserted that the PWA was being applied subjectively and inconsistently by DOLI and Mn/DOT. The Subcommittee found that prevailing wage determinations were task-specific and not position-specific, making it difficult for contractors to make accurate estimates regarding surveying costs, and recommended that a position-specific approach be used.[231]

The Subcommittee requested input from the industry on its findings and on the following draft classifications: Survey Technician; Survey Crew Chief; and Survey Technician, Seasonal.[232]

111. During the time period relevant to this proceeding, there is no evidence that Mn/DOT made efforts to provide notice in Mn/DOT contracts or otherwise publicize the fact that it had interpreted the PWA to apply to members of survey crews regardless of the performance of manual labor or that it had determined on several occasions that surveyors' work was most similar to the Common Laborers classification.

112. At some point during 2007-2009, after the TH 212 Project was well underway, representatives of the MSPS spoke to the DOLI Commissioner and DOLI Assistant Commissioner Roslyn Carter Wade about their concerns regarding the absence of a specific classification for non-licensed personnel in the field.[233] Assistant Commissioner Wade told the MSPS representatives that, absent a specific classification based on the work that such individuals performed, their work was most similar to the laborers classification and the laborer's rate of pay would be required to be paid to them for work performed on a State-funded project.[234]

113. Mn/DOT included the following language regarding prevailing wages for surveyors in the design-build contract documents relating to the I-35W bridge project, which were executed on August 23, 2007:

> Surveys performed to progress the construction activities on the project are covered by the contract labor requirements. The workers performing the work shall be paid at a minimum wage based on the most similar trade or occupation as set forth in Exhibit F.[235]

The TH 212 Project contract did not contain this language.[236]

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[230] Ex. 135 at MDOT00200.
[231] Ex. 135 at MDOT00200-00201.
[232] Ex. 135 at MDOT00203-00204.
[233] T. 192.
[234] T. 192-93, 195.
[235] T. 594-95; Ex. 143 at section 7.4.3 (Employee Performance Requirements).
[236] T. 595, 792-93.

114. Rani Engineering, a subcontractor on the I-35W bridge project, was involved in performing survey work on that project. In March 2008, Mike Prestine of Rani Engineering sent the following email to Mr. Oelker of DOLI summarizing a conversation they had had about the applicability of the PWA to Rani's surveyors:

> As discussed, please review the summary below of our conversation to ensure that it is accurate:
>
> Regarding our surveyors on the I35W bridge project, they are not subject to Minnesota Department of Labor and Industry Prevailing Wages for State Funded Construction projects. They are running surveying instruments, doing CAD work, performing computations, and providing other civil/surveying technical services. They do have to pound some hubs, mark and flag laths, chisel some control in the concrete, but these are all incidental items that need to be done in support of their technical work. This does not constitute the major part of their job.
>
> The classification for 101 Laborer, Common (Gen Labor Work) would apply if the staff on this bridge project was pounding hub, running stakes, or doing other type of grunt work.[237]

Mr. Oelker responded to this email on March 13, 2008, by stating, "[t]hat would be a correct assessment."[238]

115. Ultimately, the Rani Engineering surveyors were classified as Skilled Laborers and Rani was required to pay, and did pay, prevailing wages to those individuals. The back wages were limited to work performed on-site and did not extend to time spent in Rani's office.[239]

116. Charles Groshens of Mn/DOT told Mr. Thorp of HTPO during meetings held in St. Paul at the Transportation Building and in the Eden Prairie Mn/DOT office in approximately 2008 that prevailing wages only applied to work performed on-site.[240]

117. Prior to the current case, Mr. Richards has never demanded that surveyors be paid prevailing wages for their time spent in the office on any of the projects on which he has worked.[241] There is no evidence that Mn/DOT has done so in any other cases.

118. At some point in early 2009, HTPO was bidding on a Mn/DOT project to remodel its headquarters in Mankato. Mr. Thorp asked Ms. Johnson to review the contract or request for proposals in order to determine whether or not HTPO would have to pay prevailing wages. Ms. Johnson did not find anything in the contract, and

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[237] Ex. 154; T. 675-77, 682.
[238] *Id.*
[239] T. 790-94.
[240] T. 845-47.
[241] T. 793-94.

recommended that HTPO call the DOLI telephone number identified in the contract to ask whether prevailing wages would apply to the project.[242] The telephone number set forth in the Mankato contract was the same as the number that was identified in ZRC's contract on the TH 212 Project as the DOLI number to call for questions about prevailing wage rates.[243] Mr. Thorp asked Jim Barich, an HTPO computer assisted design (CAD) technician, to find out more information about this.[244] Mr. Barich made a call to the DOLI telephone number in February of 2009 and asked the woman who answered the phone if prevailing wages applied to surveying for the Mankato Headquarters Project.[245] The DOLI representative told Mr. Barich that whether prevailing wages would apply depended on what the survey workers were doing, if they were holding a transit or pounding stakes. She said that the PWA did not apply if the individual was holding a transit, but did apply if the individual was pounding stakes.[246] Mr. Barich reported this information back to Ms. Johnson.[247]

VIII. DOLI Rulemaking under the PWA

119. DOLI first adopted administrative rules under the PWA in 1977. Those rules defined the classes of labor and established procedures for determining the prevailing rates for classes of labor involved in highway construction projects. In 1988, DOLI adopted truck rental rules, which were revised in 2001 as a result of various legal challenges. In 1997, DOLI amended the rules relating to master job classifications for power equipment and truck drivers. The 1997 rule amendments also made changes in the manner in which prevailing wages for highway-heavy construction were calculated.[248]

120. In February of 1998, the Court of Appeals issued an unpublished decision in *International Union of Operating Engineers, Local 49, v. Minnesota Dep't of Transp*.[249] which is cited in the prime contract in this case.[250] That case involved a provision in the PWA that specifies that the Act "applies to laborers or mechanics who deliver mineral aggregates such as sand, gravel, or stone which is incorporated into the work under the contract by depositing the materials substantially in place, directly or through spreaders, from the transporting vehicle."[251] Operating Engineers Local 49 filed a declaratory judgment action in 1996 to compel Mn/DOT to enforce Minn. Stat. § 177.44 at noncommercial, off-site facilities established for all highway construction projects, regardless of whether the projects were funded solely by the state or were funded by both state and federal sources. The district court ultimately issued an order incorporating an agreement reached by Mn/DOT and Local 49 under which Mn/DOT agreed "at a minimum" to enforce that provision of the PWA at all non-commercial off-

[242] T. 667-68, 670-71; Ex. 150.
[243] T. 668-69, 670-71; *compare* Ex. 150 and Ex. 1 at F-4.
[244] T. 572-73.
[245] T. 568-69; Ex. 134.
[246] T. 569-70; Ex. 134.
[247] T. 668, 671.
[248] Ex. 136 at 2-4.
[249] No. C6-97-1582, 1998 WL 74281 (Minn. App. 1998).
[250] *See* Finding 34.
[251] Minn. Stat. § 177.44, subd. 1.

site facilities associated with highway construction projects let based on bids after December 1, 1996, and on all contracts associated with the Stillwater Bridge project, regardless of whether federal funds were involved on the project. After this order was issued, Mn/DOT issued two notices to bidders on federal-aid highway construction projects. The first notice stated that Mn/DOT would enforce Minn. Stat. § 177.44 on projects regardless of whether they received federal funding. The second notice indicated that Mn/DOT would administer contracts according to Minn. Stat. § 177.44, subd. 2, and set forth guidelines for interpreting the term "commercial establishment" as used in the statute. In 1997, several contractors sought and were granted a temporary restraining order enjoining Mn/DOT from enforcing those guidelines on the ground that they had not been promulgated in accordance with the rulemaking procedures set forth in the Minnesota Administrative Procedure Act. Mn/DOT subsequently issued a notice that informed construction project bidders of the 1997 court order, quoted the language of that order, and stated that the notices to bidders that had been issued by Mn/DOT in 1996 were deleted from proposals for contracts. Local 49 interpreted the 1997 notice to mean that Mn/DOT would no longer follow the 1996 declaratory judgment order, and thereafter filed a motion to enforce that order. Both the district court and the Court of Appeals denied Local 49's motion. The Court of Appeals held that Mn/DOT had not violated its obligations under the 1996 declaratory judgment when it deleted the 1996 notices from proposals for contracts. In particular, the Court of Appeals noted:

> MnDOT can enforce Minn. Stat. § 177.44, as required under the [1996] declaratory judgment, without enforcing its previous guidelines for interpreting the term "commercial establishment." MnDOT's enforcement will simply have to be on a case-by-case basis. [Citation omitted.] Also, MnDOT can enforce Minn. Stat. § 177.44 on all noncommercial off-site facilities associated with highway construction projects that involve federal funds without first issuing a notice that it will do so.[252]

121. In October of 1999, the Minnesota Court of Appeals issued a decision in a lawsuit filed by *L & D Trucking* and others against Mn/DOT.[253] In that case, prospective bidders on state highway projects sought a judgment declaring that Mn/DOT's interpretation of the term "commercial establishments" as used in the PWA was invalid and entry of an order enjoining Mn/DOT from applying the interpretation. The Ramsey County District Court determined that Mn/DOT was in willful contempt of two prior court orders and awarded attorney's fees. The Court of Appeals reversed, holding that the record in that case showed that Mn/DOT was attempting to enforce the PWA "on a case-by-case basis, applying specific facts to specific parties," and "was not . . . applying its published interpretation of the term 'commercial establishments' as if it were a properly promulgated rule."[254] The Court noted, however, that it was "not unmindful of the problems that case-by-case enforcement of the prevailing-wage law creates for contractors who want to bid on state highway projects" and therefore "encourage[d]

[252] 1998 WL 74281 at 2.
[253] *L & D Trucking v. Minn. Dep't of Transp.*, 600 N.W.2d 734 (Minn. App. 1999).
[254] *Id*. at 737.

formal rulemaking by the Minnesota Department of Labor and Industry or other appropriate agency" to establish a definition of the term "commercial establishments."[255]

122. On September 20, 1999,[256] and July 30, 2001,[257] DOLI published two separate Requests for Comments on Planned Amendment to Rules Governing Prevailing Wage Determinations. Neither the 1999 nor the 2001 Requests for Comments mentioned that DOLI was considering creating a new classification applying to survey technicians.

123. DOLI appointed an *ad hoc* advisory committee on master job classifications to provide it with input regarding the need for additional classifications. The advisory committee met in February, March, and April of 2002 to gather information from interested members of the public. The meetings were open to the public, and written transcripts were prepared.[258]

124. In June of 2004, the Minnesota Court of Appeals issued a ruling in a declaratory judgment action in which a subcontractor (AAA Striping Service Company) challenged the classification of its pavement "striper" and "striper tender" employees that had been made by Mn/DOT and DOLI under the PWA.[259] The Ramsey County District Court had previously granted summary judgment in favor of Mn/DOT and DOLI. On appeal, the Court of Appeals reversed and remanded, holding, among other things, that AAA was entitled at a minimum to administrative review of the classification of its striper and striper tender employees. The Court also determined that the lower court's entry of summary judgment for the state was inappropriate due to the absence of an agency record, uncertainty regarding the origin of the state's classification of the employees at issue in the case, and the existence of material issues of fact regarding DOLI's classification determination and the subcontractor's equitable estoppel claim.[260] Although the Court was persuaded by DOLI's argument that it "is entitled to flexibility and discretion to depart from formal rulemaking when it deems the situation clear,"[261] it stated that, "in the present situation rulemaking may be most appropriate."[262] The Court underscored the importance of classification decisions and the need to provide due process to affected parties:

> To determine whether and to whom DOLI is accountable for decisions not to follow through with rulemaking, we note the importance of classification and the context in which such decisions are made. Workers, labor unions, contractors, subcontractors (including AAA), and perhaps even local units of government, have a substantial interest in the classification process. Fair wages, workers' livelihoods, the financial feasibility of projects, and

[255] *Id*.
[256] 24 State Reg. 396 (Sept. 20, 1999).
[257] 26 State Reg. 107 (July 30, 2001).
[258] T. 183, 409-44; Exs. 9-12.
[259] *AAA Striping Service Co. v. Minn. Dep't of Transp.,* 681 N.W.2d 706 (Minn. App. 2004).
[260] *Id*. at 721.
[261] *Id*. at 717.
[262] *Id*. at 718.

> entrepreneurial opportunities for contractors may be affected by these decisions. The statutes mandate investigation and hearings necessary to define worker classifications. This is strong legislative directive to observe the basics of procedural due process in making classification decisions. Minn. Stat. § 177.44, subd. 3. We conclude that at a minimum, DOLI should engage in rulemaking as specified in its own regulations, or, in the alternative, make available a reconsideration process with a contested case proceeding when requested by an aggrieved party. Like judicial proceedings, such a contested case proceeding can be abbreviated if the nature of the matter justifies summary action. To say that the decision to include striper and striper tenders in an existing classification is entirely within the discretion of DOLI, that it can exercise this discretion without a record or a hearing, and that there is no review available is inconsistent with DOLI's own rules, the statutes, and with the principles of procedural due process.[263]

The Court further noted that the rulemaking process commenced by DOLI in 2001 to consider changes to the Master Job Classifications was "unfinished and possibly dormant" and found under the circumstances that "this arguably pending rulemaking does not constitute compliance with DOLI's obligations" under Minn. R. 5200.1030, subp. 2a.C.[264]

125. On October 25, 2004, DOLI published a third Request for Comments on Planned Amendment to Rules Governing Prevailing Wage Determinations in the State Register. The notice indicated that the job classification issues to be considered included, among other things, "creating new classes for or altering the classifications applying to survey workers and quality testers."[265] The 2004 Request for Comments mentioned the similar 2001 Request for Comments and indicated that the rule amendments contemplated in the earlier request had been "put on hold" because the "advisory committee on master job classifications took longer than anticipated to appoint and conduct its meetings and because of budget priorities." Interested parties were encouraged to submit new comments in response to the issues raised.[266]

126. On July 24, 2006, DOLI published a fourth Request for Comments on Planned Amendment to Rules Governing Prevailing Wage Determinations. Like the 2004 Request for Comments, the 2006 Request for Comments expressly indicated that DOLI was considering "creating new classes for or altering the classifications applying to survey workers and quality testers." The 2006 Request reiterated the statement in the 2004 Request regarding why the rule amendments had been "put on hold."[267]

127. Despite the fact that it had published Requests for Comments in 1999, 2001, 2004, and 2006, and convened an advisory committee in 2002, and despite the

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[263] *Id.* at 717 (footnote omitted).
[264] *Id*. at 717-18.
[265] Ex. 9 (29 State Reg. 454 (Oct. 25, 2004)); T. 40-41.
[266] Ex. 9.
[267] 31 State Reg. 91 (July 24, 2006).

Court of Appeals' decisions in 1999 and 2004 encouraging rulemaking efforts, DOLI did not schedule a rulemaking hearing regarding proposed amendments to the prevailing wage rules until late May of 2008. Factors contributing to this delay included DOLI's limited resources, emphasis on other priorities, and the fact that four different DOLI Commissioners served during that period of time.[268]

128. On May 29, 2008, DOLI filed copies of its proposed prevailing wage rule amendments, draft Notice of Hearing, and draft Statement of Need and Reasonableness (SONAR) with the Office of Administrative Hearings, and requested that a hearing be scheduled regarding the proposed rules. In June 2008, DOLI mailed and published copies of the Notice of Hearing and the proposed rules.[269]

129. DOLI's proposed rule amendments were developed in cooperation with Mn/DOT.[270]

130. DOLI's SONAR relating to the proposed rules stated with respect to Class 110 - Survey Field Technician:

> This is a new master job classification proposed to reflect the trend towards including surveying in the scope of work on both highway-heavy and commercial construction prevailing wage projects. In the past the bulk of the surveying on highway and heavy projects was performed by MNDOT personnel or county surveyors. Now the construction contracts tend to call for the surveying work to be performed by on [sic] behalf of the general contractor as part of the work under the construction contract. The new classification covers the person operating the transit and the person holding the rod, not the registered land surveyor or survey foreman/supervisor.
>
> The new classification is necessary to reflect the changes in construction practices where the contracting agency performs less of the surveying services and a growing portion of the surveying work is part of the scope of work under the construction contract. The new classification is reasonable because it covers the work actually performed at the construction site and doesn't include the professional services of registered land surveyors or their foreman/supervisors.[271]

131. A hearing was held regarding DOLI's proposed rules on July 25, 2008.[272] During the rulemaking hearing, DOLI's attorney, William Bierman, stated that a separate

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[268] T. 39-44, 208-10; Report of the Administrative Law Judge regarding *In the Matter of the Proposed Amendments to the Rules of the Department of Labor and Industry, Labor Standards Unit, Relating to Prevailing Wage Determinations, Master Job Classifications, Minnesota Rules Parts 5200.1030 to 5200.1100,* OAH Docket No. 8-1900-19710-1 (Sept. 22, 2008) at 4-5, 7-9 (hereinafter referred to as "2008 Prevailing Wage Rule Report").
[269] 2008 Prevailing Wage Rule Report at 7.
[270] T. 45-47; Ex. 16; Ex. 136 at 14; 2008 Prevailing Wage Rule Report at 4.
[271] Ex. 136 at 20.
[272] Ex. 13; T. 44, 185-86.

classification for survey field technician had been included in the proposed rules at the request of Mn/DOT because "the workers out actually in the field doing those tasks and using those pieces of equipment that are listed there [in the proposed rule] need to be covered by a labor class and—or by a job classification, and they probably really need to have one of their own because they're significantly different than the other classes . . . ."[273] The survey industry was represented during the hearing and submitted comments during the rulemaking process.[274]

132. The Report of Administrative Law Judge Eric L. Lipman regarding DOLI's proposed amendments to the prevailing wage rule was issued on September 22, 2008. Judge Lipman concluded that DOLI had statutory authority to adopt the proposed rules and that the rules were necessary and reasonable, with six exceptions not relevant to the survey field technician classification.[275] Although Judge Lipman suggested that DOLI consider certain revisions to the portion of the proposed rules relating to the new classification for survey field technicians, he determined that DOLI had shown the classification was needed and reasonable.[276]

133. On March 23, 2009, DOLI published a Notice of Adoption for its rules relating to Master Job Classifications. The new rules took effect on March 30, 2009.[277] As finally adopted, the rules include the following provision relating to the new classification for a "survey field technician:"

> Survey field technician (operate total station, GPS receiver, level, rod or range poles, steel tape measurement; mark and drive stakes; hand or power digging for and identification of markers or monuments; perform and check calculations; review and understand construction plans and land survey materials). This classification does not apply to the work performed on a prevailing wage project by a land surveyor who is licensed pursuant to Minnesota Statutes, sections 326.02 to 326.15.[278]

134. At the time of the hearing in this contested case matter, DOLI was conducting wage surveys to determine what the prevailing wages and hours of work are for field survey technicians across the State. The wage surveys had not been completed or certified as of the date of the hearing. They were expected to be completed by the end of calendar year 2009.[279]

IX. Contested Case Proceedings

135. The Notice and Order for Hearing in this matter was issued by Mn/DOT on October 18, 2007. The Notice and Order for Hearing indicated that the case had been

[273] T. 113-15, 200; Ex. 13 at 38-39.
[274] T. 187; Ex. 13 at 69-84; 2008 Prevailing Wage Rule Report at 22-24.
[275] 2008 Prevailing Wage Rule Report at 21, 26, 27, 29, 30.
[276] *Id*. at 22-24.
[277] 33 State Reg. 1598 (March 23, 2009); T. 17, 187.
[278] Minn. R. 5200.1100, subp. 2 (as amended effective March 30, 2009).
[279] T. 116-18, 196-97.

initiated "to allow petitioners a contested case hearing to challenge the validity of Mn/DOT's order letter of August 15, 2007, pertaining to Valley Infrastructure d/b/a Zumbro River Constructors' failure to ensure the property [sic] payment of prevailing wages on State Project No. 1017-12 referenced above."[280] It identified the issue to be addressed at the hearing as follows:

> Whether prevailing wage payments to workers by Respondent ZRC's subcontractor, Respondent HTPO, were proper and/or does Respondent HTPO owe back wages to the workers on State Project No. 1017-12 which was funded in whole or in part with State and Federal funds in violation of the Minnesota Department of Transportation Standard Specifications for Construction Number 1808(9) (2000) and/or the State Prevailing Wage Act Minn. Stat. §§ 177.41 through 177.44 (2006).[281]

136. On June 23, 2008, ZRC and HTPO sought dismissal/summary disposition of Mn/DOT's claims for additional wages. After the motion was fully briefed, the Administrative Law Judge denied the motion in a ruling issued on September 24, 2008, finding that genuine issues of material fact remained for hearing and the Respondents had not shown at that stage of the proceedings that they were entitled to judgment as a matter of law.

137. The case proceeded to hearing on July 8, 9, 10, and 15, and September 15, 2009, and post-hearing briefs were submitted. On the last day of hearing in this matter, Mn/DOT asserted that HTPO's "office" time relating to the TH 212 Project was also covered under the PWA.[282] When Mn/DOT filed its post-hearing Reply Memorandum in this matter on November 13, 2009, it attached a 36-page document labeled as "Appendix A" which indicated that the total back wages owed to HTPO employees under the PWA is $239,543.44. By letter filed on November 20, 2009, Respondents objected to Appendix A and asked that it be stricken from the record. By letter filed on December 1, 2009, Mn/DOT asked that the request to strike be denied.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Transportation have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50 and 177.44, subd. 7.

2. The Notice of Hearing is proper in all respects and the Department complied with all procedural requirements of law and rule.

[280] Notice and Order for Hearing at 1.
[281] Notice and Order for Hearing at 3.
[282] T. 780-83.

3. Mn/DOT bears the burden of proving the facts at issue in this matter by a preponderance of the evidence.[283]

4. The Minnesota Prevailing Wage Act (PWA) is a minimum wage law that applies to construction projects financed in whole or in part by state funds. Its purpose is to ensure that those who work on such projects are paid wages comparable to wages paid for similar work in the community.[284]

5. The PWA is codified at Minn. Stat. §§ 177.41 - 177.44. The accompanying administrative rules are set forth at Minn. R. 5200.1000 - 5200.1120. Together, the statutes and the rules govern the determination, certification, and payment of prevailing wages to laborers, workers and mechanics working on state-funded construction projects.

6. The prevailing wage must be paid for "work under the contract," which means "all construction activities associated with the public works project" regardless of whether the construction activity or work is performed by the prime contractor or subcontractor.[285]

7. Under the PWA, DOLI establishes the labor classifications for workers and determines the prevailing wage rate for the classifications.[286] Those classifications, Master Job Classifications, appear in Minn. R. 5200.1100. "Laborer or mechanic" means a worker in a construction industry labor class identified in or pursuant to part 5200.1100.[287]

8. According to Minn. R. 5200.1030, subp. 2a, item C, of the DOLI rules:

> If work is performed by a class of labor not defined by part 5200.1100, Master Job Classifications, the contracting agency shall assign a wage rate and the commissioner of labor and industry shall review and certify the assigned wage rate based on the most similar trade or occupation from the area wage determination. Within 90 days, the Commissioner of Labor and Industry must initiate the rulemaking procedure so that the classification will be defined in the Master Job Classifications in part 5200.1100.

9. When determining particular classes of labor, DOLI is required by the rules to "consider work classifications contained in collective bargaining agreements, apprenticeship agreements on file with the department, the 'United States Department of Labor Dictionary of Occupational Titles,' and customs and usage applicable to the construction industry."[288]

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[283] Minn. R. 1400.7300.
[284] Minn. Stat. § 177.41.
[285] Minn. R. 5200.1106, subps. 1 and 2.A.
[286] Minn. Stat. § 177.44, subds. 3 and 4.
[287] Minn. R. 5200.1106, subp. 5.A.
[288] Minn. R. 5200.1040 (E).

10. If a state contractor does not abide by the PWA, the consequences may include misdemeanor criminal sanctions (including imprisonment) and a $300 fine. In addition, the Commissioner of Transportation may reject the bids of any contractor who has failed to perform a previous contract with the State.[289]

11. While Mn/DOT has neither a policy- nor a rate-setting role under the PWA, it does have a role in enforcing the requirements of the Act. The Commissioner of Transportation is authorized by state law to "require adherence" by its contractors to the provisions of the PWA.[290]

12. In an appropriate case, the PWA likely could be interpreted to cover at least some portion of the work performed by surveyors on projects funded in whole or part by state funds. However, it is not appropriate to apply the PWA to the Respondents in the present case.

13. Mn/DOT cannot properly require ZRC and/or HTPO to pay back wages under the PWA in the present case because:

- Mn/DOT and DOLI failed to properly assign a wage rate to HTPO's survey crews under Minn. R. 5200.1030, subp. 2a(C), and 5200.1040(F);

- DOLI did not take action to initiate rulemaking to define the surveyor classification in the Master Job Classifications within 90 Days of the initial decisions by MN/DOT and DOLI that surveyors were subject to the PWA;

- Mn/DOT's attempt to enforce the PWA with respect to surveyors amounts to unauthorized rulemaking; and

- Mn/DOT failed to carry its burden to show by a preponderance of the evidence that Common Laborer was the most similar trade or occupation.

14. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

15. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

[289] Minn. Stat. §§ 161.32, subd. 1d, and 177.44, subd. 6.
[290] Minn. Stat. § 177.44, subd. 7.

Based upon these Conclusions, and for the reasons set forth in the attached Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner withdraw Mn/DOT's claim that back wages are owed to HTPO employees and remit to Respondents any contract proceeds that have been withheld.

Date: April 23, 2010.

s/Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Transportation will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Khani Sahebjam, Deputy Commissioner of Transportation, 395 John Ireland Boulevard, Mailstop 100, St. Paul, Minnesota 55155-1899, (651) 366-4800, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Pursuant to Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

I. Burden of Proof

During a telephone conference call held shortly before the start of the hearing, Mn/DOT asserted that Respondents HTPO and ZRC bore the burden of proof in this matter. Respondents disagreed and urged that the burden be placed on Mn/DOT. The Administrative Law Judge indicated that she was of the opinion that the burden of proof was on Mn/DOT to provide by a preponderance of the evidence that violations of the PWA occurred, but informed the parties that they would be given an opportunity to present arguments on this issue in their post-hearing submissions.[291] Both parties included further argument on this issue in their briefs.

The PWA does not specifically address which party must bear the burden of proof in contested case proceedings involving alleged violations of the Act. Where the governing statute is silent, the rules of the Office of Administrative Hearings provide the following guidance:

> **Burden of proof.** *The party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard*. A party asserting an affirmative defense shall have the burden of proving the existence of the defense by a preponderance of the evidence. In employee disciplinary actions, the agency or political subdivision initiating the disciplinary action shall have the burden of proof.[292]

Mn/DOT argues that it, in conjunction with DOLI, assigned and certified a wage rate as required by Minn. R. 5200.1030, subp. 2a, and thereafter notified Respondents of the determination, as well as their right to request a contested case hearing. Mn/DOT asserts that, because ZRC and HTPO requested this hearing, the burden of proof rests with them.[293] To support its argument, Mn/DOT relies on the scope of judicial review set forth in Minn. Stat. § 14.69, and case law that requires the courts to defer to agency decisions and expertise.[294]

Respondents correctly point out that Minn. Stat. § 14.69 applies not to the burden of proof in contested case hearings, but rather to the scope of judicial review to be applied by reviewing courts *after* a recommendation and decision are made by OAH and the Commissioner, respectively.[295] In addition, Respondents contend that the

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[291] T. 6-7.
[292] Minn. R. 1400.7300, subpart 5 (emphasis added).
[293] Mn/DOT's Post-Hearing Memorandum of Law at 5.
[294] *Id.* at 5-6. *See also In re space Ctr. Transp.*, 444 N.W.2d 575, 579 (Minn. Ct. App. 1989); *St. Otto's Home v. Minn. Dept. of Human Services*, 437 N.W.2d 35, 40 (Minn. 1989).
[295] Respondents' Post-Hearing Reply Memorandum at 2-4.

burden of proof rests with "the party making the proposals" or the party seeking to invoke a statute.[296]

The Administrative Law Judge concludes that it is Mn/DOT who must bear the burden of proof in this proceeding. Because Mn/DOT asserts that HTPO owes its employees in excess of $200,000 in additional wages as a result of violations of Minnesota's prevailing wage laws, Mn/DOT is the party that is "proposing that certain action be taken" under Minnesota Rule 1400.7300. Accordingly, Mn/DOT has the burden of proving the facts at issue by a preponderance of the evidence. This conclusion is consistent with the ruling in another recent case arising under the PWA.[297]

II. Applicability of the PWA to Survey Crews

The PWA specifies that a "laborer or mechanic employed by a contractor, subcontractor, agent, or other person doing or contracting to do all or part of the work under a contract . . . to which the state is a party, for the construction or maintenance of a highway" must be paid "at least the prevailing wage rate in the same or most similar trade or occupation in the area."[298] The phrase "laborer or mechanic" is defined in the DOLI rules to mean "a worker in a construction industry labor class identified in or pursuant to part 5200.1100."[299] "Work under the contract" is defined in the DOLI rules to mean:

> all construction activities associated with the public works project, including . . . work conducted pursuant to a contract . . ., regardless of whether the construction activity or work is performed by the prime contractor, subcontractor, trucking broker, trucking firms, independent contractor, or employee or agent of any of the foregoing entities, and regardless of which entity or person hires or contracts with another.[300]

Respondents maintain that survey crews are not "laborers" or "mechanics" performing work under the contract and are not engaged in "construction activities," but rather are professional design team members providing professional services on the Project. In support of their argument, Respondents point out that the U.S. Department of Labor Dictionary of Occupational Titles, which DOLI is required to consider when making labor classification determinations, classifies land surveyors and their assistants as "professional" occupations.[301] In contrast, Respondents assert that the common dictionary definition of "laborer" is "a person who does unskilled physical work for wages,"[302] and the Dictionary of Occupational Titles describes "Construction Worker II"

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[296] *Id.* at 2 (*citing In re Minnesota Pub. Utils. Comm'n*, 365 N.W.2d 341, 343 (Minn. Ct. App. 1985) and *In re Application of City of White Bear Lake,* 311 Minn. 146, 247 N.W.2d 901, 904 (Minn. 1976)).

[297] Findings of Fact, Conclusions and Recommendation issued in *In the Matter of the MnDOT Detroit Lakes Regional Headquarters,* OAH Docket No. 8-3001-17706-2 (Sept. 28, 2009), at 38-39.

[298] Minn. Stat. § 177.44, subd. 1.

[299] Minn. Rule 5200.1106, subp. 5A.

[300] Minn. Rule 5200.1106, subp. 2.

[301] Ex. 115, ¶ 018.167-034 (Surveyor Assistant, Instruments).

[302] Respondents' Post-Hearing Memorandum at 24 (citing Merriam-Webster's Collegiate Dictionary, p. 650 (10th Ed. 1993).

as an individual who performs tasks that require "little or no independent judgment."[303] Respondents emphasize that HTPO's subcontract was labeled as one for professional services; HTPO maintains professional liability insurance for all of their employees; HTPO is a professional service corporation for tax purposes; and HTPO's work is regulated by the Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience, and Interior Design.[304] Respondents contend that the demonstration conducted at the hearing by Mr. Mehlhop and Mr. Stadsvold shows that surveyors and surveyor assistants perform complicated work requiring skill, judgment, and precision.[305] Respondents also note that surveyors are only covered by the federal Davis-Bacon Act if they are primarily doing manual work, and argue that the hearing testimony established that HTPO's two-person crews are not engaged in primarily manual labor. Finally, Respondents contend that HTPO's work involves design work – specifically, verifying the site conditions reflected in the design – and not "construction activities," and therefore does not fall within the definition of work "under the contract." Respondents view their work as work that must be completed *before* construction can proceed by others.

Mn/DOT contends that there is no question that the PWA requires that prevailing wages be paid to those performing survey work on projects funded in whole or part by state funds. In this regard, Mn/DOT asserts that surveyors engage in work under the prime contract and perform work to further construction activities. Mn/DOT further argues that coverage of surveying tasks is in keeping with the PWA language[306] stating that the public policy underlying the Act is to pay "laborers, workers, and mechanics on projects funded in whole or part by state funds" a wage comparable to that paid for similar work in the community.[307] Although survey crew members are not identified in a construction industry labor class set forth in part 5200.1100, Mn/DOT points out that it may assign a wage rate based on the most similar trade or occupation in an existing classification consistent with Minn. Rule 5200.1030, subp. 2a(C). Mn/DOT maintains that, read together, these statutes and rules demonstrate that the prevailing wage applies to all work performed on a project under a State contract unless a specific exemption applies, and that any worker on a state project is defined as a "laborer or mechanic."[308]

The Administrative Law Judge concludes that, in an appropriate case, the PWA likely could be interpreted to cover at least some portion of the work performed by surveyors on projects funded in whole or part by state funds. If certain surveyors engage primarily in physical labor, it is possible that they may fall within the category of "laborer." Moreover, since the PWA contains a broad policy statement referring to

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[303] Ex. 115, ¶ 869.687-026 (Construction Worker II).
[304] *Id.* at 25-26.
[305] Respondents' Post-Hearing Memorandum at 24-25.
[306] Minn. Stat. § 177.41; *see also Faribault County v. Minnesota Department of Labor and Industry*, 427 N.W.2d 166, 170 (Minn. App. 1991), *rev. denied* (Minn. August 29, 1991) (Minn. Stat. § 177.41 "requires that prevailing wages be paid on all projects funded in whole or part by state funds . . . .)"
[307] Minnesota Department of Transportation's Post-Hearing Memorandum of Law (Mn/DOT's Post-Hearing Memo) at 6-7.
[308] Mn/DOT's Post-Hearing Memo at 6-8.

"workers" on covered projects as well as "laborers" or "mechanics," the reach of the PWA arguably should not be restricted to those acting in the capacity of "laborers" or "mechanics." The PWA does not contain an exception for professional workers, as does the federal Davis-Bacon Act, and the evidence in this record demonstrates that survey crew members do not have licenses or specialized training other than that obtained on-the-job. In addition, the DOLI rules define "work under the contract" to include "all construction activities associated with the public works project, including . . . work conducted pursuant to a contract . . ., regardless of whether the construction activity or work is performed by . . . [a] subcontractor." It appears that at least some of the work performed by surveying firms could be interpreted to be work performed to further construction activities or aid the progress of the construction of a project. However, for the reasons set forth below, the Administrative Law Judge has determined that the current case is *not* an appropriate case to require payment of back wages under the PWA. As a result, it is not necessary for the Administrative Law Judge to decide definitively which portion of the work performed by surveyors could be subject to prevailing wage requirements under other circumstances.

III. Respondents Cannot Properly Be Required to Pay Back Wages

Even if it is assumed that the PWA may apply to at least some part of the work performed by survey crews on State highway projects, the Administrative Law Judge concludes that Mn/DOT cannot properly require ZRC and/or HTPO to pay back wages under the PWA in the present case. There are several reasons for this determination: (1) Mn/DOT never properly assigned a wage rate to survey field crews on the Project; (2) DOLI failed to initiate rulemaking to define the surveyor classification in the Master Job Classifications within 90 days of the initial decision that surveyors were subject to the PWA; (3) Mn/DOT's attempt to enforce the PWA with respect to surveyors amounts to unauthorized rulemaking; and (4) Mn/DOT failed to carry its burden to show that Common Laborer was the most similar trade or occupation. Each of these points is discussed below.

A. Mn/DOT and DOLI Failed to Properly Assign a Wage Rate to HTPO's Survey Crews

It is undisputed that the list of Master Job Classifications included in the DOLI rules in effect prior to March 2009 did not include a separate classification for surveyors. The parties also agree that no specific prevailing wage rate for survey crews was set forth in ZRC's prime contract or in HTPO's subcontract on the Project. The DOLI rules adopted under the PWA set forth a particular process to be followed in instances in which work on a prevailing wage project is performed by a class of labor not named in the Master Job Classifications. Since surveyors did not have their own classification in the Master Job Classifications list at the time, the process for assigning a wage rate was governed by Minn. R. 5200.1030, subp. 2a(C). According to that rule:

> If work is performed by a class of labor not defined by part 5200.1100, Master Job Classifications, the contracting agency shall assign a wage rate and the commissioner of labor and industry shall *review and certify*

> the assigned wage rate based on the most similar trade or occupation from the area wage determination. *Within 90 days, the Commissioner of Labor and Industry must initiate the rulemaking procedure so that the classification will be defined in the Master Job Classifications* in Part 5200.1100.[309]

Once the contracting agency (here, Mn/DOT) has assigned a wage rate, the rule requires that the Commissioner of DOLI "review and certify" the wage rate assigned by the contracting agency "based on the most similar trade or occupation from the area wage determination." With respect to this requirement, Mn/DOT Senior Labor Investigator Robert Richards testified that he contacted Erik Oelker at DOLI. As reflected in the Findings of Fact, Mr. Richards told Mr. Oelker that he had determined that the apprenticeship program that was created by DOLI for laborers included 160 hours of "required" training on surveying work, and informed him that he believed that the 101 Common Laborer classification on the existing Master Job Classification list was the most similar classification with respect to the duties performed by the surveyors on the TH 212 job. Mr. Oelker told Mr. Richards that he concurred. Mr. Richards did not have any contact with anyone else at DOLI regarding this issue. Neither Mr. Oelker nor anyone else at DOLI ever certified or confirmed in writing that DOLI believed that Common Laborer was the most same or similar trade or occupation to survey field crews. Mr. Richards generally did not receive written confirmation from Mr. Oelker during this time frame.

The term "certify" is not defined in the PWA or in the DOLI rules. Under the canons of construction, words and phrases set forth in Minnesota statutes generally are to be construed "according to their common and approved usage," while technical words and phrases that have acquired a special meaning or are defined in statute are construed according to such special meaning or definition.[310] According to the Merriam-Webster On-Line Dictionary, the common meaning of the term "certify" is as follows:[311]

> **1 :** to attest authoritatively: as **a :** **CONFIRM** **b :** to present in formal communication **c :** to attest as being true or as represented or as **meeting** a standard **d :** to attest officially to the insanity of
> **2 :** to inform with certainty **:** **ASSURE**
> **3 :** to guarantee (a **personal check)** as to signature and amount by so indicating on the face
> **4 :** to recognize as having met special qualifications (as of a governmental agency or professional board) within a field <agencies that certify **teachers**>

The Merriam-Webster On-Line Dictionary identifies "attest," "witness," and "vouch" as synonyms of "certify," and states that the term "usually applies to a written statement, especially one carrying a signature or seal." The term "certify" is similarly defined in

[309] (Emphasis added.)
[310] Minn. Stat. § 645.08.
[311] http://www.merriam-webster.com/dictionary/certify.

Black's Law Dictionary as "to authenticate or verify in writing" or "to attest as being true or as meeting certain criteria."[312] The Minnesota Supreme Court has also, in a long line of cases, construed the term "certify" to mean "to testify to a thing in writing."[313]

It is evident that neither the Commissioner of DOLI nor Mr. Oelker on behalf of the Commissioner ever certified in writing or attested that Common Laborer was the most similar construction trade or occupation in light of the type of work performed by HTPO's employees. Mn/DOT's witnesses testified that, during the relevant time period, it was typical for Mr. Oelker to simply engage in conversations about such matters with Mn/DOT investigators and not issue anything in writing. However, such an informal process is not what is contemplated by Minn. R. 5200.1030; rather, certification *by the Commissioner* is required. Failure to comply with this requirement is not a "harmless error," as Mn/DOT argues. Issuance of a formal written certification by or on behalf of the Commissioner would ensure that DOLI more formally examined each particular wage assignment made by a contracting agency and would also serve the purpose of providing some notice to regulated parties of the State's intent to require payment of prevailing wages. Had written certification been issued in the past with respect to other surveying firms that were required to pay prevailing wages to surveyors, it is conceivable that HTPO would have learned of this certification and would have assumed higher wages for its surveyors when making its bid on the Project. Written certification also would be more likely to trigger rulemaking by DOLI to define the classification, as contemplated by the rule. Because Mn/DOT failed to ensure that the Commissioner of DOLI properly certified the wage rate, it did not follow the proper procedure to assign a wage rate to the HTPO surveyors.

Finally, the DOLI rules specify in part 5200.1040 that "work classifications contained in collective bargaining agreements, apprenticeship agreements on file with the department, the 'United States Department of Labor Dictionary of Occupational Titles,' and customs and usage applicable to the construction industry" must be considered in determining particular classes of labor.[314] Mn/DOT admitted in response to Respondents' Requests for Admissions that it did not consult the Dictionary of Occupational Titles in connection with its prevailing wage investigation prior to the issuance of Mr. Richards' June 19, 2007, letter concluding that the Common Laborer classification was the same or most similar trade or occupation for the work performed by HTPO's employees, or Mr. Ravn's August 15, 2007, letter directing that back wages

[312] *Black's Law Dictionary* (8th ed. 2004).

[313] *See, e.g., State v. Morgan,* 235 Minn. 388, 390, 51 N.W.2d 61, 62 (Minn. 1952); *Chadbourne v. Hartz,* 93 Minn. 233, 235, 101 N.W. 68, 69 (Minn. 1904); *State v. Brill,* 58 Minn. 152, 156, 59 N.W. 989, 990-91 (Minn. 1894).

[314] Minn. R. 5200.1040(F) (emphasis added). While part 5200.1030, subp. 2a(C), is primarily applicable to the process under which Mn/DOT and DOLI assign a wage rate to work performed by a class of labor not defined in the Master Job Classifications, the requirement under part 5200.1040(E) that DOLI "consider work classifications contained in collective bargaining agreements, apprenticeship agreements on file with the department, the 'United States Department of Labor Dictionary of Occupational Titles,' and customs and usage applicable to the construction industry" when making labor classifications provides guidance to DOLI in making its determination.

be provided to HTPO employees within 20 calendar days.[315] And there is no evidence that DOLI reviewed the Dictionary of Occupational Titles in considering whether the general laborer rate should be assigned to surveyors. This provides further evidence that Mn/DOT and DOLI failed to comply with the applicable rules in assigning a wage rate to HTPO surveyors.

B. DOLI Did Not Take Action to Initiate Rulemaking to Define the Surveyor Classification in the Master Job Classifications within 90 Days of the Initial Decisions by Mn/DOT and DOLI that Surveyors were Subject to the PWA

Part 5200.1030 of the rules requires that, after reviewing and certifying the appropriate wage rate, the Commissioner of DOLI "must" take action "within 90 days" to "initiate the rulemaking procedure so that the classification will be defined in the Master Job Classifications" set forth in part 5200.1100. If rulemaking is commenced and rules are adopted, regulated parties would receive some notice that the State intended to apply the PWA requirements to a class of labor not specifically defined in the existing rules.

Mn/DOT contends that DOLI complied with this provision because it had published Requests for Comments on possible amendments to the prevailing wage rules in 1999, 2001, 2004, and 2006, and convened an advisory committee in 2002. However, neither the 1999 Request for Comments nor the 2001 Request for Comments mentioned that DOLI was considering creating a new classification applying to survey technicians, and the brief discussion of survey crews that occurred during the April 2002 advisory committee meeting included comments by Mn/DOT representatives implying that Mn/DOT agreed with the federal interpretation that the prevailing wage requirements only applied to those performing manual labor. Moreover, DOLI's rulemaking efforts proceeded only in fits and starts during the next decade, and several lengthy stretches of apparent dormancy occurred. DOLI acknowledged in both its 2004 and 2006 Requests for Comments that the rule amendments contemplated earlier had been "put on hold" due to budget priorities and a longer-than-anticipated advisory committee process. DOLI did not schedule a rulemaking hearing regarding proposed amendments to the prevailing wage rules until late May of 2008, the rulemaking hearing did not occur until late July of 2008, and final rules were not adopted until March of 2009. Under the circumstances of this case, the Administrative Law Judge does not agree that DOLI's brief convening of an advisory committee in 2002 and its issuance of a series of Requests for Comments before finally proposing rules in 2008 were sufficient to satisfy DOLI's obligations under Minn. R. 5200.1030.

While the Court of Appeals recognized in the *AAA Striping* case that DOLI has the flexibility and discretion to depart from formal rulemaking when it "deems the situation clear,"[316] it is evident that surveyors do not fall into that category. In fact, counsel for DOLI acknowledged during the 2008 rule hearing that a separate

[315] Ex. 116 at 12 (Requests for Admission Nos. 5 and 6). In light of these admissions by Mn/DOT, Mr. Richards' testimony (see T. 289, 314, 316) that he reviewed the Dictionary during his investigation and determined that the definitions for surveyor and for laborer were similar cannot be credited.

[316] *AAA Striping Service Co. v. Minn. Dep't of Transp.,* 681 N.W.2d 706, 717 (Minn. App. 2004).

classification for survey field technician had been included in the proposed rules at the request of Mn/DOT because "the workers out actually in the field doing those tasks and using those pieces of equipment that are listed there [in the proposed rule] need to be covered by a labor class and--or by a job classification, and *they probably really need to have one of their own because they're significantly different than the other classes* . . . ."[317]

Because DOLI did not initiate a rulemaking proceeding to include surveyors within the Master Job Classifications within 90 days of the initial decisions by MN/DOT and DOLI that surveyors were subject to the PWA, it failed to comply with Minn. R. 5200.1030. By virtue of this failure, survey subcontractors were not placed on official notice that they should assume when placing bids on state-funded projects that some or all of their survey employees working on the project would have to be paid at the prevailing wage rate applicable to Common Laborers or some other labor classification.

C. Mn/DOT Engaged in Unauthorized Rulemaking

The Respondents argue in the present case that Mn/DOT engaged in unauthorized rulemaking when its investigators determined that the work performed by HTPO's surveyors was covered by the PWA and fell within the Common Laborer classification. Mn/DOT contends in response that it was not engaging in rulemaking but rather in "case-by-case" adjudication of a situation in which work was being performed by a class of labor not defined in the Master Classifications List.

The Minnesota Administrative Procedure Act (APA) broadly defines the term "rule" to mean "every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure."[318] The APA requires that agencies adopt rules by following the rulemaking procedures set forth in the statute. Specifically, the APA states that agencies "shall" adopt rules that set forth "the nature and requirements of all formal and informal procedures" that relate to the administration of the agency's official duties "to the extent that those procedures directly affect the rights of or procedures available to the public."[319] In addition, the APA requires that, "[u]pon the request of any person, and as soon as feasible and to the extent practicable, each agency shall adopt rules to supersede those principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases it intends to rely on as precedents in future cases."[320] Finally, as emphasized above, the PWA invests rulemaking authority only in DOLI, and part 5200.1030 of DOLI's PWA rules requires that, after reviewing and certifying the appropriate wage rate, the Commissioner of DOLI "must" take action "within 90 days" to "initiate the rulemaking procedure so that the classification will be defined in the Master Job Classifications" set forth in part 5200.1100.

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[317] Ex. 13 at 38-39 (emphasis added).
[318] Minn. Stat. § 14.02, subd. 4. Exceptions to the definition are set forth in Minn. Stat. § 14.03, subd. 3.
[319] Minn. Stat. § 14.06(a).
[320] Minn. Stat. § 14.06(b).

If an agency fails to comply with required rulemaking procedures, its improper "rule" is considered invalid.[321] For example, in *Sa-Ag, Inc. v. Minnesota Department of Transportation,*[322] the Minnesota Court of Appeals held that Mn/DOT's issuance of an addendum to all bidders on state contracts, which purported to interpret the term "substantially in place" as used in the PWA and identify which haulers of sand and gravel would have to adhere to prevailing wage rates, constituted unauthorized rulemaking. The Court held that the addendum was an agency statement of general applicability and future effect and, because the term was subject to more than one interpretation, the addendum amounted to an interpretive rule that needed to be adopted pursuant to Minnesota APA.

Minnesota courts have held that an agency may formulate policy either by adopting rules under the Minnesota APA or by making individual case-by-case determinations.[323] The Court of Appeals agreed in a case arising under the PWA that DOLI "is entitled to flexibility and discretion to depart from formal rulemaking when it deems the situation clear."[324] However, in making case-by-case determinations, an agency must apply specific facts to specific parties.[325]

The record in this case supports the conclusion that Mn/DOT did, in fact, engage in unauthorized rulemaking rather than case-by-case determination in applying the PWA to HTPO's surveyors. The DOLI rules under the PWA that were in existence at the time ZRC entered into its prime contract with Mn/DOT and HTPO entered into its subcontract with ZRC made no attempt to define either the overall reference to "laborer"[326] or the specific reference to "Laborer, common (general labor work)."[327] Based upon the record of this proceeding, it is clear that there was no single, commonly held understanding that surveying tasks were included within the "Common Laborer" classification. Neither the DOLI rules nor the prime contract for the TH 212 Project that was incorporated into HTPO's subcontract included any wage rates for surveyors or described the "Common Laborer" classification as including survey tasks.

Starting in approximately 2003 with Mr. Groshens' letter to Mark Dierling of Short Elliott Hendrickson Inc., Mn/DOT began to interpret the PWA more broadly than the

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[321] *See, e.g., White Bear Lake Care Center, Inc. v. Minnesota Dept of Pub. Welfare,* 319 N.W.2d 7, 9 (Minn. 1982); *Donovan Contracting of St. Cloud, Inc., v. Minnesota Dept. of Transp*, 469 N.W.2d 718 (Minn. Ct. App. 1991), *rev. denied* (Minn. Aug. 2, 1991).
[322] 447 N.W.2d 1 (Minn. App. 1989).
[323] *See, e.g., Bunge Corp. v. Commissioner of Revenue*, 305 N.W.2d 779 (Minn. 1981); *AAA Striping Service Co. v. Minnesota Dept of Transp.,* 681 N.W.2d 706, 717 (Minn. App. 2004)(when determining that workers are members of an existing labor classification, agency has the discretion to either engage in rulemaking or offer an aggrieved party reconsideration of the job classification through a contested case proceeding); *L&D Trucking v. Minnesota Dept of Transp*., 600 N.W.2d 734, 736 (Minn. App. 1999) (Court upheld Mn/DOT's authority to enforce the Prevailing Wage law on a case-by-case basis and determined, based on Mn/DOT's investigation and findings, that Mn/DOT was properly applying the PWA to specific facts and parties and was not enforcing its interpretation of "commercial establishment" as if it were a promulgated rule); *In re Hibbing Taconite Co*., 431 N.W.2d 885, 894-95 (Minn. App. 1988).
[324] *AAA Striping,* 681 N.W.2d at 717.
[325] *L&D Trucking,* 600 N.W.2d at 736.
[326] Minn. R. 5200.1040 (2007).
[327] Minn. R. 5200.1100 (2007).

federal Davis Bacon and Related Acts and require more generally that surveyors be paid prevailing wages in the appropriate labor classification as determined by the contractor. Mn/DOT supplied a "wish list" to DOLI later in 2003 requesting that surveyors be given a separate classification by DOLI or that language be added to include them in existing classifications. Despite the fact that DOLI did not actively proceed to adopt such a rule, Mn/DOT thereafter applied its broader interpretation of the applicability of the PWA to surveyors (supported by Mr. Oelker's informal "concurrence" in its classification determinations) across contractors and subcontractors and gave those determinations future effect. The record demonstrates that Mn/DOT applied its more expansive interpretation of the requirements of the PWA to several survey firms after 2003, including Yaggy Colby in 2006, HTPO and EVS in 2007, and Rani Engineering in approximately 2008. Mn/DOT ultimately determined in each instance that at least some of the work performed by survey crews working for those firms was subject to the PWA. Mn/DOT treated the surveyors employed by Rani Engineering as Skilled Laborers, and the surveyors employed by the other firms as Common Laborers. The June 19, 2007, letter issued by Mr. Richards regarding Mn/DOT's view that HTPO survey crews were covered under the PWA was virtually identical to June 7, 2007, letter issued by Clancy Finnegan (another Mn/DOT investigator) to EVS and the City of Bloomington regarding another project, and a June 25, 2007, letter issued by Mr. Richards to EVS regarding its work on the TH 212 Project. The issuance of nearly identical conclusions involving three separate situations supports the view that Mn/DOT was applying a rule that should have been developed by DOLI through rulemaking, and was not engaging in a case-by-case, fact-specific determination.

Moreover, based upon testimony elicited at the hearing, it appears that Mn/DOT's position that the PWA applies to all survey crew members regardless of the type of work they perform is not shared by DOLI. For example, in response to an inquiry from Rani Engineering in March 2008, Mr. Oelker of DOLI confirmed that the PWA only applies to survey crew members who primarily perform manual work. Similarly, a DOLI employee answering an information line identified in the ZRC contract as the number to call for questions about prevailing wage rates informed HTPO in February 2009 that the PWA would not apply if the survey worker was holding a transit, but would apply if the worker was pounding stakes.

There is no showing that Mn/DOT made any effort to provide contractors with notice of changes in its interpretation of the PWA, or of the manner in which its interpretation differed from that of DOLI. Although the 1998 and 2005 Technical Memoranda issued by Mn/DOT discussed certain issues regarding payment of construction surveyors, neither Memorandum stated that survey crews would have to be paid prevailing wages under the PWA, or discussed any labor classification that would apply to them. Mn/DOT did not discuss PWA requirements for surveyors in pre-bid meetings or include any statement in its 2005 contract with ZRC about these changes, despite its ability to do so.[328] Mn/DOT also did not otherwise publicize prior to 2005 the

[328] For example, Mn/DOT did include a notice in its August 2007 contract for the I-35W bridge project that "[s]urveys performed to progress the construction activities on the project are covered by the contract labor requirements." Ex. 143 at § 7.4.3. Mn/DOT could have stated in the prime contract for the TH 212

fact that it had interpreted the PWA to apply to members of survey crews regardless of the performance of manual labor and had determined on several occasions that surveyors' work was most similar to the Common Laborers classification. And, as discussed above, Mn/DOT did not ensure that DOLI complied with the directive in Minn. R. 5200.1030 that rulemaking be initiated within 90 days to define the survey technician classification in the Master Job Classifications set forth in Minn. R. 5200.1100.

The conclusion that Mn/DOT engaged in unauthorized rulemaking rather than case-by-case determination is also supported by the very limited nature of the investigation conducted by Mn/DOT with respect to HTPO. Case-by-case adjudication by administrative agencies generally requires the application of an extrinsic source of law (either a statute or regulation) *to the facts of the particular case*.[329] In this matter, there was very little effort by Mn/DOT to determine the facts relating to the nature of HTPO's work on the Project. The Mn/DOT investigator admitted that he observed HTPO employees on the Project for only very brief periods of time on a limited number of occasions and he did not interview HTPO or other surveyors to ascertain the nature of the work they performed on the Project. He also acknowledged that he was unfamiliar at the time with the Total Station used by HTPO crews. Mn/DOT also made only a limited attempt during its investigation to determine the facts relating to the training of Common Laborers and the nature of the work they perform. There is no evidence that Mn/DOT contacted individuals conducting the training in the laborers' apprenticeship program to obtain specific information about the "instruments" and "line and grade" courses. The Mn/DOT investigator erroneously assumed and told Mr. Oelker that 160 hours of instruction in field surveying tasks were "required" as part of the apprenticeship program. Mn/DOT's witnesses were unable to explain in any detail how the tasks performed by Common Laborers on state construction projects were similar to tasks performed by HTPO's survey crews. Rather than engaging in a case-by-case determination regarding coverage of HTPO surveyors under the PWA based upon the particular work they performed in a particular situation, it appears that Mn/DOT merely sought to establish a more general proposition not found in existing statute and rule that it would also apply in future cases. Such an approach requires rulemaking which, under the PWA, can only be conducted by DOLI.

DOLI's recent rule amendments adding a new job classification for survey field technicians were not effective until March 2009, and thus are not applicable here. However, comments made by DOLI during the rulemaking proceeding provide further support for the conclusion that Mn/DOT's enforcement action in this case amounts to

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Project that surveys performed to progress the construction activities on the Project would be covered by the contract labor requirements, as it did in the I-35W bridge contract. Similarly, Mn/DOT could have provided additional information in the prime contract for the TH 212 Project about the types of work encompassed in the "Common Laborer" classification. Mn/DOT did not take either of these approaches in drafting the contract for the TH 212 Project. There was no attempt to notify either ZRC as the prime contractor or HTPO as one of the surveying subcontractors that prevailing wages were required for surveyors.

[329] G. Beck et al., *Minnesota Administrative Procedure,* § 16.1 (2d ed. 1998); Findings of Fact, Conclusions and Recommendation issued in *In the Matter of the MnDOT Detroit Lakes Regional Headquarters,* OAH Docket No. 8-3001-17706-2 (Sept. 28, 2009), at 44-45.

unauthorized rule making. As noted above, counsel for DOLI admitted during the rulemaking hearing that a separate classification for survey field technician had been included in the rules at Mn/DOT's request because those workers "need to be covered by a labor class and--or by a job classification, and *they probably really need to have one of their own because they're significantly different than the other classes* . . . ." It is evident that DOLI, the agency that is entrusted with authority to promulgate rules under the PWA, did not believe that it was clear or obvious that survey field technicians should be encompassed within the Common Laborers' classification.

Mn/DOT's contentions about the amount of back wages owed by Respondents also underscore that it is applying unpromulgated policies in this case that are not of a longstanding nature rather than applying the PWA and the DOLI rules that were in existence at the time. Mn/DOT asserted on the last day of the hearing and in its post-hearing briefs that it should be permitted to recoup back wages under the PWA for *all* work performed by unlicensed survey employees of HTPO (regardless of whether performed on-site or off-site, and regardless of whether it involved design work or survey work in aid of construction activities).[330]

Generally, in assessing whether an agency has engaged in a permissible interpretation of existing law rather than improper application of an unpromulgated rule, Minnesota courts have examined the words of the existing statutes and rules and considered whether the agency's interpretation is consistent or inconsistent with the plain meaning of those words. If the interpretation is not within the plain meaning of existing statutes or rules, courts have found that the agency action is not authorized and the interpretation is invalid.[331] Minnesota courts have further held that, where an existing rule is ambiguous and the agency's interpretation is long-standing, the agency may be deemed to be interpreting the rule rather than adopting a new rule.[332]

Mn/DOT's argument in this case that the PWA extends to both on-site and off-site work by surveyors does not fall within the plain meaning of the DOLI rule which defines "work under the contract" to encompass "*construction activities associated with the public works project*."[333] At a minimum, the DOLI rule would appear to be susceptible to more than one interpretation, similar to the situation involved in the *Sa-Ag* case[334] in which Mn/DOT was found to be engaging in unauthorized rulemaking.

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[330] Mn/DOT also submitted as an attachment to its post-hearing Reply Memorandum a 36-page document labeled Appendix A indicating that Respondents owe approximately $239,543 in back wages rather than its previous estimate of $207,671. Mn/DOT contends that Appendix A consists of information taken from testimony and various hearing exhibits and shows the office and field payrolls provided by HTPO by week and pay period. Respondents objected to the inclusion of Appendix A with the Reply Memorandum and urged that it be stricken. The Administrative Law Judge agrees that Appendix A amounts to a late-filed exhibit which should be considered stricken from the record.

[331] G. Beck et al., *Minnesota Administrative Procedure*, § 16.4.2 (2d ed. 1998).

[332] *Id*.

[333] Minn. R. 5200.1106, subp. 2 (emphasis added).

[334] *Sa-Ag. Inc. v. Minnesota Dep't of Transp.*, 447 N.W.2d 1, 5 (Minn. App. 1989) (agency interpretation of a statutory term in a contract addendum constituted unauthorized rulemaking where the statutory term was subject to more than one interpretation).

Even if the DOLI rule were viewed as ambiguous in nature, the interpretation that Mn/DOT is attempting to apply here is not one that it has consistently applied over a lengthy period of time. In fact, Mn/DOT's contention in the current case is at odds with its determinations in various other investigations regarding what particular work performed by surveyors is covered under the PWA. For example, the prevailing wages that Mn/DOT required Rani Engineering pay to its surveyors on the I-35W bridge project were limited to work performed on site and did not extend to time spent in the office. Mn/DOT did not require all of the on-site land surveying activities conducted by the Yaggy Colby surveying firm to be subject to the PWA when it calculated the amount of back wages owed on the ROC 52 project in 2006. Mn/DOT excluded from that calculation the portion of Yaggy Colby's work related to design rather than construction based on a determination that the design work was not "work under the contract," and it did not require the time spent by Yaggy Colby on "as built" measurements to be covered by the PWA. Moreover, Mr. Groshens told HTPO during two meetings in 2008 that prevailing wages only applied to work performed on-site, and Mr. Richards' hearing testimony in the present case reflected a view that prevailing wages should not be imposed for design or office work. There is no evidence that Mn/DOT has ever before demanded that surveyors be paid prevailing wages for their time spent in the office. Because the interpretation Mn/DOT is seeking to apply here is not consistent with the plain language of the DOLI rule or the agency's longstanding practice, it provides further evidence that Mn/DOT is attempting to apply an unpromulgated rule.[335]

For all of these reasons, the Administrative Law Judge concludes that Mn/DOT has engaged in unauthorized rulemaking in this matter, rather than case-by-case adjudication.

D. Mn/DOT Failed to Carry its Burden to Show by a Preponderance of the Evidence that Common Laborer was the Most Similar Trade or Occupation

As discussed above, Minn. R. 5200.1030 requires that the contracting agency (here, Mn/DOT) assign a wage rate and the Commissioner of DOLI review and certify the assigned wage rate "based on the most similar trade or occupation from the area wage determination." In attempting to determine which of the existing classifications were the most same or similar trade or occupation, Mr. Richards met with union representatives and reviewed apprenticeship programs associated with four trades (laborers, carpenters, cement finishers, and ironworkers). He ultimately concluded that Common Laborers perform certain tasks that are the same or similar to those performed by HTPO survey crews.

Mn/DOT asserts that Mr. Richards' testimony about the steps he took during his prevailing wage investigation shows that the Common Laborer classification was properly identified as being the most similar to the work done by HTPO survey crews.[336] In contrast, Respondents contend that the testimony of Mn/DOT's witnesses did not

[335] *See, e.g., Wenzel v. Meeker County Welfare Bd.,* 346 N.W.2d 680, 684 (Minn. App. 1984); *White Bear Lake Care Center, Inc. v. Minnesota Dep't of Pub. Welfare,* 319 N.W.2d 7, 9 (Minn. 1982).
[336] Mn/DOT's Post-Hearing Memo at 11.

demonstrate that the Common Laborer classification is the most similar trade or occupation to the work performed by HTPO employees. If the PWA is found to apply to HTPO's workers, Respondents further argue that the Landscape Laborer classification should be applied because Landscape Laborers' work is just as similar to the surveying work done by HTPO and the prevailing wage rate required for Landscape Laborers is more comparable to the wages that were paid by HTPO to its survey crews.[337]

Mr. Richards has never worked as a land surveyor or operated a Total Station or other equipment used by surveyors, and did not interview HTPO surveyors or consult with any land surveying professionals in reaching this determination. He estimated that he visited the Project only two or three times for at least one hour each time, and admitted that he looked over the entire Project during those visits. There is no evidence that Mr. Richards interviewed laborers or observed them at length to ascertain what tasks they performed that were similar to those performed by HTPO surveyors. Mr. Richards had some experience working as a laborer in the construction industry many years ago, between 1965 and 1973. He testified that he believed that Common Laborers' tasks included such tasks as surveying, holding a rod and a tape measure, running a transit, clearing brush, putting in grade stakes, blue topping, and staking for watermains, bridges, concrete, bituminous, sewer lines, berms, and noise walls. However, the basis for this testimony was cast into doubt by his later acknowledgement that he was not qualified to specifically describe the tasks performed by Common Laborers that are similar to those performed by field survey crews:

> Q [by counsel for Respondents] And I am trying to get at the nature of the field surveying they [Common Laborers] do. It sounds like you're not qualified to tell us about that; is that right?
>
> A [by Mr. Richards] No, I am not qualified to tell you what they do. I just referred to the Book of Occupational Titles for surveyor and for laborer, and there are similar definitions; and apprenticeship agreements, which is one of the things Labor and Industry looks at, and there is a considerable amount of time spent teaching them surveying. I haven't gone to their school. I only take their documents for what they are worth.[338]

The actual apprenticeship agreements were not offered into evidence by Mn/DOT.

Mr. Richards testified that he relied primarily on the laborers' apprenticeship agreements and the "Book of Occupational Titles" in reaching his conclusion about what wage rate to assign. Because apprenticeship agreements typically do not describe the scope of the course but simply list the type and name of the course,[339] Mr. Richards' review of those agreements does not provide a persuasive foundation for his assertions about the surveying tasks performed by laborers. In addition, Mr. Richards mistakenly believed that the apprenticeship agreement for the laborers union required that individuals receive 160 hours of training in field surveying, and told Mr. Oelker that the

[337] Respondents' Post-Hearing Memo at 29-30.
[338] T. 314.
[339] T. 371.

apprenticeship program that was created by DOLI for laborers included "required" training on surveying work. In fact, the apprenticeship program merely offered 40 hours of elective training in "instruments" and 40 hours of elective training in "line and grade." The misinformation that apparently was provided to Mr. Oelker about the nature of the laborers' training undermines the weight to be given to the informal concurrence given by Mr. Oelker.

As noted in the Findings, Mr. Richards' testimony that he relied on the *Dictionary of Occupational Titles* in assigning a wage rate is not credible in light of Mn/DOT's admissions to the contrary. His further allegation that there are similar definitions in the *Dictionary* for surveyor and laborer and that both definitions encompass rodmen, transit men, people with computer tape equipment, and those who clear brush and pound stakes also lacks credibility. If the *Dictionary of Occupational Titles* had been reviewed by either Mn/DOT or DOLI, it would have revealed that there is a considerable difference between the descriptions of work performed by a "surveyor assistant" and that performed by a "construction worker II" (the closest description to that of "laborer"). The position of "Surveyor Assistant, Instruments" is classified as a professional position which involves obtaining data pertaining to angles, elevations, points, and contours used for construction or other purposes using a variety of surveying instruments (such as Alidade, level, transit, plane table, Theodolite, and electronic distance measuring equipment); compiling notes, sketches, and records of data obtained and work performed; directing work of subordinate members of the team; and performing other survey work as directed by the Party Chief. In contrast, the *Dictionary of Occupational Titles* defines "Construction Worker II" as an individual who performs a variety of types of physical labor "requiring little or no independent judgment," such as digging, spreading, and leveling dirt and gravel "using pick and shovel"; lifting and carrying building materials, tools, and supplies; cleaning equipment and work areas; mixing and spreading concrete and other materials, using handtools; and performing a "variety of routine, nonmachine tasks." A number of designations are listed in the definition of Construction Worker II relating to the specific work such individuals may perform. The listed designations include "Grader (construction)" and "Grade Tamper (construction)." None of the listed designations refer to "surveyor" or to survey work in any way.[340]

Other witnesses called by Mn/DOT did not provide further clarity about the basis for the agency's position that the Common Laborer classification was the most similar trade to surveyors. Jessica Looman, a staff attorney for the Laborers District Council of Minnesota and North Dakota, stated during her testimony that she was only "generally" or "somewhat" familiar[341] with the two elective courses offered in the apprenticeship program that related to survey skills (a 40-hour "instruments" class and a 40-hour "line and grade" class). She was unable to identify which instruments laborers are trained to operate in the instruments course because she was "only familiar with the apprenticeship program as a whole and not the individualized training."[342] She also did not know how much of the time spent in either of the two courses was devoted to

[340] Ex. 115.
[341] T. 364.
[342] T. 371.

classroom training as opposed to practical, hands-on training,[343] and agreed that it would be necessary to talk to the trainers to know the particular tasks that laborers are trained to perform.[344] She has never worked as a laborer and did not have firsthand knowledge of what tasks laborers actually performed in the field.[345]

Charles Groshens, Mn/DOT's Investigation Supervisor, testified generally that he understands Common Laborers perform demolition and traffic control work, set blue tops, run string lines, rake asphalt, do clean-up work, set interlocking blocks, and run mud trucks,[346] but was unable to provide more detailed responses to questions about laborers' tasks. For example, when asked whether a Common Laborer establishing elevations for aggregate base basically used elevations that had been given to them by a land surveyor, Mr. Groshens admitted that he had "no idea" but "would assume so." When asked if Common Laborers were "just measuring," Mr. Groshens responded, "I don't know all the details of it, no" and stated, "What I know today is that they do train their people to do surveying. What aspects of it I have no idea, and I don't know how a surveyor sets up his marks or his stuff."[347] He indicated that Mn/DOT was not contending that the Common Laborers use a Total Station and a prism and derive elevations from previously determined control points,[348] but again emphasized, "I do know that the laborer classification does have surveying and that kind of stuff in it."[349] Mr. Groshens also testified that he did not know what Mn/DOT looked at when it assigned a wage rate to HTPO's field crews, and specifically did not know whether Mn/DOT looked at the union collective bargaining agreement or the Dictionary of Occupational Titles.

In contrast, the Respondents' witnesses offered credible testimony that very few Common Laborer tasks are similar to the duties performed by HTPO's surveyors. Based upon that evidence and the definitions in the *Dictionary of Occupational Titles,* it is clear that, unlike surveyors, Common Laborers typically perform physical labor on highway projects. In connection with that work, they may perform simple measurements off of points previously located by land surveyors, using rulers or levels, in order to determine the proper location for work they are performing in the field, and may pound stakes or clear brush. They do not typically use a transit or other instruments used by surveyors. The Respondents also provided persuasive evidence that Landscape Laborers on highway construction projects similarly measure off points established by land surveyors, and that the tasks of Landscape Laborers are just as similar to those performed by surveyors as the tasks performed by Common Laborers.

The Administrative Law Judge concludes that Mn/DOT failed to bear its burden to show that the Common Laborer classification was the most similar trade or occupation to HTPO's surveyors. The record as a whole simply does not provide an

[343] T. 372.
[344] T. 371.
[345] T. 374-375.
[346] T. 130.
[347] T. 98.
[348] T. 97-98.
[349] T. 77-78.

adequate basis upon which one could reach such a conclusion. Accordingly, in the event that the Commissioner determines that the PWA properly applies in this case and back wages are owed, it is recommended that the Landscape Laborer wage rate be applied rather than the Common Laborer wage rate.

IV. Conclusion

Based upon the record as a whole, the Administrative Law Judge finds that Mn/DOT failed to properly assign a wage rate to the work performed by HTPO's survey employees; DOLI failed to initiate rulemaking to define the surveyor classification in the Master Job Classifications within 90 days of the initial decision that surveyors were subject to the PWA; Mn/DOT engaged in unauthorized rulemaking; and Mn/DOT failed to carry its burden to demonstrate that Common Laborer was the most similar trade or occupation. Accordingly, the Administrative Law Judge concludes that Mn/DOT is not entitled to recover back wages from ZRC or HTPO under the PWA.[350]

B. L. N.

[350] There is no need to reach the Respondents' further argument that the DOLI rules under the PWA are unconstitutionally vague as applied here. Moreover, whether or not Mn/DOT has engaged in arbitrary or capricious enforcement of the PWA is a question to be determined in judicial review of a final agency decision, and is not appropriately addressed by the Administrative Law Judge at this stage of the proceeding. *See* Findings of Fact, Conclusions and Recommended Decision in *In the Matter of the City of Lake Elmo's Comprehensive Plan,* OAH Docket No. 1-7600-15193-3 (2003) at 20.